104

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1917

No. [redacted] 48

43

JOHN GEORGE DAY AND ISAIAH NEWTON DAY, PARTNERS UNDER THE FIRM NAME OF J. G. & I. N. DAY, APPELLANTS,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED NOVEMBER 11, 1915.

(24,966)

27

(24,988)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 284.

JOHN GEORGE DAY AND ISAIAH NEWTON DAY, PARTNERS UNDER THE FIRM NAME OF J. G. & I. N. DAY, APPELLANTS,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOVEMBER 1, 1916.

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Court of Claims.

No. 21182.

JOHN GEORGE DAY and ISAIAH NEWTON DAY, Partners under the Firm Name of J. G. & I. N. Day,

vs.

THE UNITED STATES.

I. *Petition and Amended Petition.*

On November 1, 1898 the claimants filed their original petition. Subsequently to wit: on the 5th day of April 1907, the claimants by leave of Court, in lieu of said original petition, filed their amended petition, which is as follows:

I.

Petitioners are and at the times hereafter stated were citizens of the United States and of the State of California, and at such times they were partners in business under the firm name of J. G. and I. N. Day.

II.

In an act of the Congress of the United States approved July 13, 1892, entitled "An act making appropriations for the construction, repair and preservation of public works on rivers and harbors and other purposes," there was a a provision for continuation of work on a dam and locks at the Cascades of the Columbia River and appropriating three hundred and twenty-six thousand, two hundred and fifty dollars ($326,250) therefor. (27 Statutes at Large, 109).

III.

Under and by virtue of said act of Congress, petitioners as such partners and by said firm name, on the 27th day of December, 1892, entered into a contract with Maj. Thomas H. Handbury of the Corps of Engineers of the United States army, acting for and on behalf of the United States, under the direction of the Secretary of War, for the completion of the work of improving said canal at the Cascades of the Columbia River. Said contract provided in substance that, in consideration of certain payments to be made by the United States, petitioners would proceed at once to complete said canal and locks in accordance with plans and specifications, attached to and made a part of said contract, and which had been prepared and furnished by the War Department. At the time of entering into said contract the United States had been engaged in constructing said locks for the period of sixteen years and had

spent in such work one million eight hundred and fifty-nine thousand six hundred and sixty-six dollars and forty cents ($1,859,666.40). Immediately on the execution and approval of
2 said contract petitioners entered on the Government reservation at said Cascades, took control of the Government plant at said improvement and began the work of completing the improvement, and they were engaged in said work in the months of May and June, 1894. From the time of beginning said work on said canal and locks under said contract up to May 28, 1894, petitioners had received from the United States for their work nearly three hundred thousand dollars ($300,000), so that on said 28th day of May said project represented to the United States an actual cash outlay of about two million, one hundred and fifty-nine thousand dollars ($2,159,000).

IV.

One paragraph of the specifications of said contract was as follows:

45. Contract to include: The contract to be entered into will include all excavations and dregging including the removal of the bulkheads, masonry, filling behind walls, grading and protection of slopes, the placing of irons, the construction of the gates and operating machinery, in short the entire completion of the lock ready for use, as shown by the drawings and set forth in these specifications.

Another paragraph of said specifications was as follows:

149. Responsibility for Property: The contractor will be held responsible, without expense to the government, for the preservation and good condition of all the work now in place, and such as he may, from time to time, under this contract put in place, until the termination of the contract, or until the whole work is turned over to the Government in a completed condition, as required. This to include all material of every description on which full or partial payments have been made, and all property belonging to the United States in the possession or control of the contractor.

Said specifications contained nothing beside said two paragraphs on the subject of, or in any way relating to, the preservation or protection of said work already constructed.

V.

Following is the text of said contract executed between said Major Handbury and petitioners:

Articles of Agreement entered into this 27th day of December eighteen hundred and ninety-two, (1892), between Major Thomas H. Handbury, Corps of Engineers, U. S. Army, of the first port, and John George Day, and I. N. Day, partners, doing business under the firm name of J. G. & I. N. Day, of San Francisco, of the county of San Francisco, State of California, of the second part.

This Agreement Witnesseth that, in conformity with the adver-

tisement and specifications hereunto attached, and which form a part of this contract, the said Thos. H. Handbury, for, and in behalf of the United States of America, and the said J. G. and I. N. Day for themselves, their heirs, executors and administrators, have mutually agreed, and by these presents do mutually covenant and agree, to and with each other, as follows:

3 The party of the second part shall furnish such labor and material in place, and do such work, and discharge such other obligations connected therewith prescribed in the forementioned specifications, as may be necessary to complete the work of "Improving Canal at the Cascades of the Columbia River, Oregon."

For such material, labor, work and other obligations, the party of the first part agrees to pay to the party of the second part as follows, viz.:

For excavation: Dry, (172,500 cubic yards, more or less) fifty cents, (50c) per cubic yard. Sub-aqueous, (60,000 cubic yards, more or less) one dollar, ($1.00) per cubic yard. For Rock Excavation: Dry, (100,000 cubic yards, more or less) one and 35-100th dollars ($1.35) per cubic yard. Sub-aqueous, (21,600 cubic yards, more or less) two and 50-100th dollars ($2.50) per cubic yard For Granite Dimension Stone: Cutting and laying, (716 cubic yards, more or less) sixty-three and 50-100ths dollars ($63.50 per cubic yard. For Basalt Dimension Stone: Cutting and laying (5,688 cubic yards, more or less) thirty-six dollars ($36.00) per cubic yard. For Basalt Face Stone, Cutting and laying, (3,744 cubic yards, more or less) Thirty-two dollars, ($32.00) per cubic yard. For Granite or Basalt stone: Laying, (1,751 cubic yards, more or less) Five dollars, ($5.00) per cubic yard. For Basalt Quarry-Faced Stone, Cutting and laying, (1,789 cubic yards, more or less) Twenty-eight dollars, ($28.00) per cubic yard. For Basalt Quarry-Faced Stone: Laying, (1738 cubic yards, more or less) Four dollars, ($4.00) per cubic yard. For Rubble Masonry, (15,-000 cubic yards, more or less), Two dollars ($2.00) per cubic yard. For paving slopes, (12,000 square yards, more or less) Two and 50-100 dollars, ($2.50) per square yard. For concrete, (46,300 cubic yards, more or less) Six and 25-100 dollars ($6.25) per cubic yard. For Grading, with material obtained other than in course of excavation, (5,000 cubic yards, more or less) twenty-five cents, (25c) per cubic yard. For Gates, (2,239,000 lbs. of steel, more or less,) thirteen cents, (13c) per pound. For Valves and Frames for Culverts: Steel plates angles, rivets etc. (216,000 lbs. more or less) eleven cents (11c) per pound. Forged Steel, (27,600 lbs. more or less) twelve cents, (12c) per pound. Cast Steel, (19,200 lbs. more or less) fifteen cents, (15c) per pound. Cast Iron, (600 pounds more or less) five cents, (5c) per pound. Bronze, (1,800 lbs. more or less) thirty-five cents (35c) per lb. For Gate Anchorages: Steel rods, links and pins, (43,900 lbs., more or less) fourteen cents, (14c) per pound. Wrought iron nuts, (2,500 lbs., more or less) thirteen cents, (13c) per pound. Cast iron, (17,200 lbs., more or less) five cents (5c) per pound. For other Connections between Gates and Gate Anchorages: Cast Steel, (187,000 lbs., more or less)

five cents (5c) per pound. Steel plates, forging etc. (75,700 lbs., more or less) fifteen cents (15c) per pound. Wrought iron, (13,000 lbs more or less) fifteen cents (15c) per pound. For Snubbing hooks, wedge bolts; and miscellaneous iron built into or connected with masonry, (10,000 lbs. more or less) nine cents (9c) per pound. For Manoeuvering Machinery: Forged steel, (12,000 lbs., more or less) seventeen and one half cents, (17½) per pound. Wrought iron, (4,000 lbs. more or less) fifteen cents, (15c) per pound. Cast iron, (440,000 lbs., more or less) nine cents, (9c) per pound.

4 Brass, (2,000 lbs., more or less) twenty-six cents (26c) per pound. Hydraulic wrought iron pipe, (5,000 lbs. more or less) six cents, (6) per pound. For Pumps: Two triplicate plunger pumps, Four hundred dollars ($400.00) each. One 12 inch centrifugal pump, Nine hundred and eighty dollars, ($980.00) For Capstans; One power capstan, Five hundred and five dollars ($505.00) Twelve hand-power capstans, seventy-five dollars ($75.00) each. For two (2) turbine water wheels. Three hundred and thirty-eight dollars, ($338.00) each.

The aggregate of all payments to be made to the party of the second part, shall not exceed the sum of one million, seven hundred and forty-five thousand, five hundred dollars, ($1,745,500.00) less the amount expended by the party of the first part for contingencies and other expenses:

Payments to be made by the party of the first part upon monthly estimates, which will include the material excavated, and the material delivered in place during each calendar month for the gates to be considered in place when delivered upon the Government grounds.

Payment to be contingent upon such appropriations as may from time to time be made by law, and the remittances made thereunder by the U. S. Treasury Department; but from each payment ten (10) per cent of the amount will be retained until the final completion of this contract.

All material furnished and work done under this contract shall, before accepted, be subject to rigid inspection by an inspector appointed on the part of the Government, and such as do not conform to the specifications set forth in this contract shall be rejected. The decision of the Engineer officer in charge as to quality and quantity shall be final.

The said J. G. & I. N. Daly shall commence the work to be done under this contract as prescribed by the specifications hereunto attached, within ten days from the date of notification of approval of the contract by the Chief of Engineers, U. S. Army, and shall prosecute the same to completion as prescribed by paragraphs 165 and 166 of said specifications.

If, in any event, the party of the second part shall delay or fail to commence with the delivery of the material or the performance of the work on the day specified herein, or shall, in the ju-gement of the engineer in charge, fail to prosecute faithfully and diligently the work in accordance with the specifications and requirements of this contract, then, in either case, the party of the first part, or his successor legally appointed, shall have power, with the sanction of the

Chief of Engineers, to annul this contract by giving notice in writing to that effect to the party (or parties or either of them) of the second part; and upon the giving of such notice, all money or reserved percentage due or to become due to the party or parties of the second part by reason of this contract shall be and become forfeited to the United States; and the party of the first part shall be thereupon authorized, if an immediate performance of the work or delivery of the material be in his opinion required by the public exigency, to proceed to provide for the same by open purchase or contract, as prescribed in Section 3709 of the Revised Statutes of the United States: Provided, however, that if the party (or parties) of the second part shall by freshets, ice, or other forces or violence of the elements, and by no fault of his or their own, be prevented either from commencing or completing the work, or delivering the materials at the time agreed upon in this contract, such additional time may, in writing, be allowed him or them for such commencement or completion as, in the judgment of the party of the first part, or his successor, shall be just and reasonable; but such allowance and extension shall in no manner effect the rights or obligations of the parties under this contract, but the same shall subsist, take effect and be enforceable precisely as if the new date for such commencement or completion had been the date originally herein agreed upon.

If, at any time during the prosecution of the work, it be found advantageous or necessary to make any change or modification in the project, and this change or modification should involve such change in the specifications as to character and quantity, whether of labor or material, as would either increase or diminish the cost of the work, then such change or modification must be agreed upon in writing by the contracting parties, the agreement setting forth fully the reasons for such change, and giving clearly the quantities and prices of both material and labor thus substituted for those named in the original contract and before taking effect must be approved by the Secretary of War: Provided, that no payments shall be made unless such supplemental or modified agreement was signed and approved before the obligation arising from such modification was incurred.

No claim whatever shall at any time be made upon the United States by the party or parties of the second part for or on account of any extra work or material performed or furnished, or alleged to have been performed or furnished under or by virtue of this contract, and not expressly bargained for and especially included therein, unless such extra work or materials shall have been expressly required in writing by the party of the first part or his successor, the prices and quantities thereof having been first agreed upon by the contracting parties and approved by the Chief of Engineers.

The party of the second part shall be responsible for and pay all liabilities incurred in the prosecution of the work for labor and material.

It is further understood and agreed that, in case of failure on the part of the party of the second part to complete this contract as

specified and agreed upon, that all sums due and percentage retained, shall thereby be forfeited to the United States, and that the said United States shall also have the right to recover any or all damages due to such failure in excess of the sums so forfeited and also to recover from the party of the second part, as part of said damages, whatever sums may be expended by the party of the first part in completing the said contract, in excess of the price herein stipulated to be paid to the party of the second part for completing the same.

Payments shall be made to the said J. G. and I. N. Day as hereinbefore described, reserving ten 10 per cent from each payment until the whole work shall have been so delivered and accepted.

Neither this contract nor any interest therein shall be transferred by the said J. G. and I. N. Day to any other party; and any such transfer shall cause the annulment of the contract so far as the United States are concerned. All rights of action, however, to recover for any breach of this contract by the said J. G. and I. N. Day are reserved to the United States.

No member of or delegate to Congress, nor any person belonging to, or employed in, the military service of the United States, is or shall be admitted to any share or part of this contract, or to any benefit which may arise herefrom.

This contract shall be subject to approval of the Chief Engineer U. S. A.

In Witness Whereof the undersigned have hereunto placed their hands and seals the date first hereinbefore written.

(Signed) THOS. H. HANDBURY,
Major, Corps Engineers.
JOHN GEORGE DAY.
I. N. DAY.

VI.

The purpose of said paragraphs 45 and 149 of the specifications, as understood by said Major Handbury and petitioners, was merely that petitioners should be responsible for all damage to the work already constructed which might be done incidentally by or through the acts of petitioners, or through the acts of other persons than authorized agents of the United States, during such continuance of the work. It was not intended that petitioners should repair or be responsible for any damage to the existing structures which might be caused by a flood or rise in the river. No thought was had by said Major Handbury or the other officers of the War Department or by petitioners of any submergence of the structures by a flood. According to the plans and specifications the structures were to be several feet higher than the river had ever been known to be at any flood; and when petitioner's work commenced there was already a bulkhead around the site of the work, built by the United States, to the full specified height of the project, and unless through the impairment of said bulkhead it was not possible that damage should be done to any part of the work by the river though even at said highest known level. If, in the light of these facts, the words of said specifications and contract signify a liability of petitioners for injury to the pre-

viously constructed work not occurring in said casual or incidental way, these words were mistakenly used and do not constitute a true memorandum of the agreement.

VII.

Said bulkhead was not at any time damaged by petitioner's operations or any acts of other persons, but it remained intact and, except as is hereinafter stated, perfectly performed its function of protecting the work; nor did any other considerable injury to the work occur during and from petitioner's operations or the acts of other persons.

VIII.

During May and June, 1894, a great flood occurred in said river, the water rising six feet above said highest known level. On May 28, 1894, the water was rising at the rate of one inch per hour and there was a raging torrent, and it became evident that the
7 work would be submerged and great damage done to it unless some protection not named in said specifications and contract, and not contemplated by the parties when the contract was executed, should be provided. To afford such protection petitioners, under authority from Major James C. Post, the United States engineer officer in charge of the work of this character of that district, furnished the necessary materials, and by great exertions constructed, over a line nearly 2,000 feet long, a new and higher bulkhead and two temporary dams. The water continued to rise for some days after said work was commenced, and it remained above said highest previous level for fifteen days, but said work prevented the inundation of the existing structures and saved them from injury. In thus saving the project from injury petitioners themselves and their employees were engaged continuously for ten days; the personal efforts of both of petitioners being devoted to said work to the exclusion of all other business. For a week during the rise of the river the work was prosecuted, in order to keep ahead of the water, by night as well as by day. The cost of the materials and labor employed by petitioners in said work was thirty-nine thousand eight hundred and sixty-nine dollars and thirty-one cents ($39,869.31), and the reasonable value of the service so rendered by petitioners themselves was ten thousand dollars ($10,000).

IX.

At the time of said flood the engineer officer in charge of the work, Lieut. Harry Taylor, was temporarily absent therefrom and communication to and from the site of the work, whether by telegraph or by mail, was cut off. Petitioners, seeing the danger to the existing structures, and at the request of the Assistant Engineer on the work, began to assemble material and planned to do what they might to prevent damage by the flood. Because of the absence of said Lieut. Taylor said Major Post hurried to the Cascades. Upon his arrival he ascertained and expressed his gratification at said preparations and

plans of petitioners, and, communication with Washington or with superior officers elsewhere still being impossible, he requested petitioners to push this protective work by all means available and promised that they should be compensated for their efforts and expenditures in so doing.

X.

The work which had been done on said project before petitioners took said contract consisted chiefly of dry masonry, paving, excavation and embarkments constructed of silt and other light materials. If submerged by said flood of May and June, 1904, such work must necessarily have been almost destroyed, the stones of which it was in part constructed carried away too far to be recovered and the surface of the site of the work washed away down to bed rock. Around the work, outside said bulkhead and dams constructed by petitioners, said flood did strip the earth from the rock bed and carry it away, leaving exposed after the water receded an almost unbroken surface of boulders. The work that petitioners had done under their contract was almost entirely solid masonry reinforced by concrete, and this could not have been considerably injured by any of that action of the water which was prevented by said exertions of petitioners.

8 XI.

According to the plan of said improvement, on which the said previous work had been done by the United States and which was exhibited to petitioners and other bidders as a guide for their proposals on the work to contract in 1892, the walls and protecting embankments of the improvement were to be built to a height of one hundred and forty-two (142) feet above a certain arbitrary base line; and it was to that height said original bulkhead, existing when petitioners entered upon the performance of their contract work, had been built. Because of said rise in the river of May and June, 1894, said Maj. Post in his annual report bearing date June 30, 1894, which was used as an exhibit to the report of said Chief of Engineers for the same year, recommended that the project be changed so as to bring such protective works to the height of one hundred and forty-eight (148) feet above said line. Said Chief of Engineers approved of said suggestion and made said change in the project, and in the subsequent work done upon the same the walls and embankments were brought up to said height of one hundred and forty-eight (148) feet.

The premises considered, petitioners pray that, if the Court deem it necessary, said contract signed by petitioners and said Major Handbury may be reformed so as to accord with the allegations of paragraph VI hereinbefore, and that they may have judgment against the United States in the sum of forty-nine thousand eight hundred and sixty-nine dollars and thirty-one cents ($49,869.31): their claim with respect to the matters hereinbefore stated not being

assigned, wholly or in part, and they being the sole owners of the same.

J. G. AND I. N. DAY,
By BENJ. CARTER,
Their Attorney in Fact.

DISTRICT OF COLUMBIA, *ss:*

Before me, Jennie M. Sheffer, a Notary Public in and for said District, Benj. Carter, whose name is written as a part of the signature to the foregoing petition, being by me sworn, made oath that the allegations of said petition are true to the best of his knowledge, information and belief.

BENJ. CARTER.

Subscribed and sworn to before me this 3rd day of April, A. D., 1907.

JENNIE M. SHEFFER,
Notary Public.

9 II. *Amendment to Amended Petition.*

Subsequently to wit, on the 7th day of February 1912, the claimants by leave of court, filed an amendment to the amended petition, which is as follows:

Amendment to Amended Petition.

Claimants by leave of court amended in the following particulars their amended petition heretofore filed in this cause:

I.

By striking out paragraph IV and inserting in lieu thereof the following:

Specifications of said project had previously been published and were attached to said contract, and in them it was stipulated that they should be part of the contract. Following is the text of those provisions of said specifications which are pertinent to the present cause:

General Instructions for Bidders.

3. Maps of localities may be seen at this office. Bidders, or their authorized agents, are expected to visit the place and to make their own estimates of the facilities and difficulties attending the execution of the work, including the uncertainty of weather and all other contingencies.

25. The contract which the bidder and guarantors promise to enter into shall be, in its general provisions, in the form adopted

and in use by the Engineer Department of the Army, blank forms of which can be inspected at this office, and will be furnished if desired to parties proposing to put in bids. Parties making bids are to be understood as accepting the terms and conditions contained in such form of contract.

* * * * * * *

General Conditions.

28. A copy of this advertisement, specifications, and instructions will be attached to the contract and form a part of it.

* * * * * * * *

Specifications for Work.

37. The contract to be entered into, and of which these specifications and the foregoing form a part, is for furnishing all the material of every kind and description, and all the labor necessary for continuing the improvement now in progress at the Cascades of the Columbia River, Oreg., to completion, according to the present project, which requires that steamboats drawing 7 feet may enter and pass freely through the canal and lock at that stage of the river which is fixed upon as the low-water stage.

38. The general plan and present condition of the work will be shown to bidders upon application at the United States Engineer Office, No. 73 Fourth Street, Portland, Oreg., or at the office upon the Government grounds at Cascade Locks, Oreg.

39. The entire work will be under the general direction of the United States Engineer officer in charge, or his agent, who will furnish the contractor with detailed drawings of the various parts as they may from time to time be required.

40. It is imperatively necessary that bidders or their deputed representatives visit the locality of the proposed work and obtain, from personal investigation, the information necessary to enable them to make intelligent proposals, as the United States will not be responsible for any lack of accurate information on the part of the contractor regarding the work to be done. It is not considered possible for bidders to make intelligent proposals without having information to be obtained only by visiting Cascade Locks. Bidders will state in a letter transmitting proposal whether these investigations have been made.

43. The work yet to be done is, in general terms, approximately as follows, which figures will be taken as the basis for determining the aggregate amount of each proposal, viz:

Excavation:		
Dry	172,500	cubic yards.
Sub-aqueous	60,000	" "
Rock excavation:		
Dry	100,000	cubic yards.
Sub-aqueous	21,600	" "

Stone work:

Granite, dimension, to be cut and laid	716	cubic yards.
Basalt, dimension, to be cut and laid	5,688	" "
Basalt, face, to be cut and laid	3,744	" "
Granite and basalt on hand cut, to be laid	1,751	" "
Basalt, quarry face, to be cut and laid	1,789	" "
Basalt, quarry face, to be laid	1,738	" "
Rubble masonry	15,000	" "
Paving slopes	12,000	square yards.
Concrete	46,300	cubic yards.
Grading slopes or grounds with material obtained otherwise than in course of excavation.	5,000	" "

* * * * * * *

45. Contract to include.—The contract to be entered into will include all excavations and dredging, including the removal of the bulkheads, masonry, filling behind walls, grading and protection of slopes, the placing of irons, the construction of the gates and operating machinery, in short, the entire completion of the lock ready for use, as shown by the drawings and set forth in these specifications.

46. Contractor to furnish all material and work.—It is understood and agreed that the contractor under his contract prices for work in place is to furnish and pay for all materials of every description entering into or connected with either the permanent or temporary construction, and that he is to supply and pay for all labor, skilled or otherwise, required to prepare and place the materials and complete the work according to the drawings and specifications.

51. All material washed or left within the lines of excavation by freshets shall, if required, be removed by the contractor at his price for "Excavation." No payment will be made, however, for removing material the second time washed back within limits on account of its having been temporarily or otherwise piled too near the lines, as to which the Engineer Officer in charge shall be judge.

142. Plant.—There is on the ground a large amount of plant belonging to the Government with which this work has heretofore been carried on. Most of this is in good order and repair and ready for immediate use.

143. A list of such of this property as can be turned over to the contractor will be made, and he will be permitted to select from it such as he may desire to use, which will be loaned to him free of charge for use, upon the Government grounds, in connection
11 with the work under contract, but is not to be taken from these grounds. This property which the contractor must keep in good repair while in his possession, to be returned to the Government at the termination of the contract in like good order and condition as when received, excepting the wear and tear and deterioration incident to proper usage and care during the progress of the work or time that the contract is in force.

149. Responsibility for Property.—The contractor will be held responsible without expense to the Government, for the preservation

and good condition of all the work now in place, and such as he may from time to time under this contract put in place, until the termination of the contract, or until the whole work is turned over to the Government in a completed condition, as required. This to include all materials of every description on which full or partial payments have been made, and all property belonging to the United States in the possession or control of the contractor.

150. The United States will not be responsible for the safety of employees, plant or material used by the contractor, nor for any damage done by or to them from any source or cause whatever.

162. Extra Work.—No claim for extra work or material, or for delay of any kind will be considered or paid unless an agreement therefor shall be made in writing and approved by the Chief of Engineers, United States Army. The contract price is to be full compensation for furnishing all materials, labor, and appliances necessary for doing all the work herein specified.

II.

By striking out the concluding paragraph and inserting in lieu thereof two paragraphs as follows:

XII. The reasonable value of materials used by petitioners in said protection of the works from inundation and which they therefore were not able to use in the work provided for by said contract was then and there twenty-five thousand four hundred and forty-five dollars ($25,445.00), and the value to the United States of said emergency service performed by them, exclusive of said value of materials, was two hundred thousand dollars ($200,000.00).

Petitioners pray that, if the court deem it necessary, said contract signed by petitioners and Major Handbury may be reformed so as to accord with the allegations of paragraph VI hereinbefore, and that they shall have judgment against the United States in the sum of two hundred and twenty-five thousand four hundred and forty-five dollars ($225,445.00); their claim with respect to the matters hereinbefore stated being entirely unpaid, and not being assigned, wholly or in part.

J. G. DAY AND
I. N. DAY,
By BENJ. CARTER,
Their Attorney in Fact.

DISTRICT OF COLUMBIA, *ss:*

Before me, Francis L. Neubeck, a notary public in and for said District, Benj. Carter, whose name is written as a part of the signature to the foregoing petition, made oath on this third day of February, 1912, that the allegations of said petition are true to the best of his knowledge, information and belief.

BENJ. CARTER.

Subscribed and sworn to before me the day above written.

FRANCIS L. NEUBECK,
Notary Public.

12 III. *Traverse.*

Filed December 5, 1912.

In the Court of Claims of the United States, December Term, A. D.—.

No. 21182.

J. G. & I. N. Day,
vs.
The United States.

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

HUSTON THOMPSON,
Assistant Attorney General.
A. B.

13 IV. *History of Proceedings.*

On December 5, 1912 this case came on to be heard. Mr. Benjamin Carter and Mr. F. Carter Pope were heard for the claimants, and Mr. Philip M. Ashford was heard in opposition. On December 10, 1912 Mr. Carter was heard further for the claimants and Mr. Ashford for the defendants and the case was submitted.

On February 3, 1913 the court filed findings of fact and conclusion of law, dismissing the petition, with an opinion by Peele, Ch. J.

On May 3, 1913 the claimants filed a motion to set aside the judgment, amendment of findings of fact, and for a new trial, which was ordered to the law calendar.

On February 10, 1914 this motion came on to be heard. Mr. Benjamin Carter was heard for the motion, and Mr. P. M. Ashford was heard in opposition. On February 11, 1914 Mr. Carter was heard further for the motion. Mr. Ashford was heard further in opposition and the motion was submitted.

On March 16, 1914 the Court filed an order overruling claimants' motion to amend judgment; allowing in part and overruling in part claimants' motion to amend findings; withdrawing former findings and filing amended findings as of this date. Judgment and opinion to stand.

On June 12, 1914 the claimants filed a motion to amend findings of fact. On January 4, 1915 this motion was overruled by the court.

On February 4, 1915 the claimants filed a motion for amendment of findings of fact and also a motion for additional findings of fact, which were ordered to the law calender May 26, 1915.

14 V. *Argument of Motions.*

On October 5, 1915 the claimants' motion for additional findings of fact came on to be heard. Mr. Benjamin Carter was heard for the motion; Mr. P. M. Ashford was heard in opposition and the motion was submitted.

VI. *Order of Court on said Motion.*

Filed Oct. 11, 1915.

The following order was handed down by the Court:

Allowed in part and overruled in part. Former findings withdrawn and amended findings this day filed. Judgment and opinion to stand.

BY THE COURT.

15 VII. *Findings of Fact, as Amended, and Conclusions of Law, Filed October* 11, 1915, *and Opinion of the Court.*

JOHN GEORGE DAY and ISAIAH NEWTON DAY, Partners Under the Firm Name of J. G. and I. N. Day,

v.

THE UNITED STATES.

This case having been heard by the Court of Claims, the court, upon the evidence, makes the following

Findings of Fact.

I.

The claimants are, and at the times hereinafter stated were, citizens of the United States and the State of California, and at such times they were partners in business under the firm name of J. G. and I. N. Day.

II.

By the act of Congress approved July 13, 1892, entitled "An act making appropriations for the construction, repair, and preservation of public works on rivers and harbors, and other purposes," there was a provision for the continuation of work on dam and locks at the cascades of the Columbia River, and an appropriation therefor was made of $326,250.

III.

The project, to complete the contract hereinafter referred to was let, was begun in the latter part of the year 1878, and was carried on

by the Government under the direct charge of the Chief of Engineers of the United States Army up to the time proposals were advertised for in 1892, upon which the Government had expended over $1,850,000.

In the early stages of this work a bulkhead was constructed in front of upper end of the canal site for the purpose of protecting the work from inundation. At different times during the period from 1879 to 1893 this bulkhead was raised in height and increased in strength to meet conditions occasioned by floods in the Columbia River.

Records of the high water at the cascades have been kept since 1857. At the time the proposals were advertised for in 1892 the highest level of high water recorded was in 1876, when it reached an elevation of 139.1 feet. During a flood in 1880 it reached an elevation of 137.9 feet, and in 1882 it reached an elevation of 136.8 feet.

The project on which said work was to be done had been prepared by the engineers of the United States Army after some 15 years' experience on said improvement. It was revised and matured by said engineers in the year 1884 after full consideration of the records of all floods in said river and with the special object that the work, while in course of construction and when completed, should be secure from flooding by the river. The work had not since that time been flooded or damaged by the river, and the project remained in all respects unchanged when the contract hereinafter referred to was awarded.

At the time the plans for the completion of said project were prepared the protecting bulkhead had been constructed to an elevation of 142 feet, and the plans for the completed project provided for an elevation of 142 feet for the permanent work. This level had been fixed on by said Army engineers as affording an ample margin above said highest previous flood level.

16 IV.

Under and by virtue of said act of Congress referred to in Finding II the claimants, as partners, in their said firm name did on December 27, 1892, enter into a contract with the United States, through Maj. Thomas A. Hanbury, of the Corps of Engineers, United States Army, for the completion of the work of improving said canal at the cascades of the Columbia River, for which an appropriation had been made. Said contract, made part of the petition herein, provided among other things that the claimants would proceed at once to complete said canal and locks in accordance with plans and specifications made part of said contract, which had been prepared and furnished by the War Department. The said specifications were attached to the contract as a part thereof, and a copy of the specifications, so far as they are material to this cause, is attached to the amendment to the amended petition of the claimant.

Immediately on the execution and approval of said contract the claimants entered on the Government reservation at said cascades, took control of the Government plant at said improvement, and be-

gan the work of completing the same, and were engaged thereon in the months of May and June, 1894.

From the time of the beginning of said work on said canal and locks under the contract aforesaid and up to May 28, 1894, the claimants had received from the United States for their work nearly $300,000, making in all expended by the Government on said project up to that date about $2,159,000.

V.

Prior to submitting said bid the claimants had personally visited the site of the work and spent several days going over all the conditions which existed there, examining the records of the weather and the records of the gauge showing the stages of water at different times, the reports of the Chief of Engineers, including the reports of the local engineers, etc.

The local engineer in charge, Lieut. Harry Taylor, who had assisted in the preparation of said specifications, personally conducted the claimants over the work and explained to them to the best of his ability all the conditions and features connected therewith.

VI.

During the months of May and June, 1894, a flood occurred in the Columbia River, the water rising six feet above the highest level, or more than 3 feet above the bulkhead which had been constructed by the Government engineers chiefly out of dry masonry, paving excavation and embankment constructed of silt and other materials to protect the work.

On May 28, 1894, the water was rising at the rate of 1 inch per hour, and it became evident that the work would be submerged and great damage done to it unless some protection should be provided. To afford such protection and to enable them to proceed with the work under their contract the claimants, at the request of the local assistant of the engineer in charge, furnished the necessary materials, and constructed over a line nearly 2000 — long a new and higher bulkhead and two temporary dams. The water continued to rise for some days after said work was commenced, but the work prevented the inundation of the existing structures and saved them from injury.

17 The time consumed by the claimants and their employees in thus protecting the work was about 10 days, about one-half of which time the work was prosecuted by night as well as by day, the claimants devoting their exclusive time thereto.

Because of said flood the engineer in charge, in his annual report of June 30, 1894, recommended that the project be changed so as to bring such protecting work 6 feet higher, or to a height of 148 feet above said line, which recommendation was approved by the Chief of Engineers and the embankment was brought up to that height.

The cost to claimants for this emergency work, exclusive of their

own time and services, was $37,465.35, and a reasonable profit on said work to the contractors would be 10 per cent, or $3,746.53, while the value of the services of the claimants therefor, if entitled to recover, was $500, or in all $41,711.88.

VII.

On April 20, 1895 the contractors addressed the following letter to the engineer officer in charge:

J. G. & I. N. Day, General Contractors.

CASCADE LOCKS, OREGON, April 20, 1895.

Jas. C. Post, Major, Corps of Engineers, U. S. A.

DR. SIR: Shortly after the flood of last June, you informed our Mr. J. G. Day that you would take up the matter of expenditures occasioned by the flood in your report, and that while there did not appear to be any provision in the contract empowering you to pay such expenditures you were not disposed to evade any responsibility assumed by you for the same.

We do not find in your report any mention of said expenditures and respectfully ask whether it is your intention to take the matter up at any future time, and if so, when.

Very respectfully,

J. G. & I. N. DAY.

To said letter Major Post made the following reply:

United States Engineer Office.

P. O. Drawer 50.

PORTLAND, OREGON, Apr. 22, 1895.

Messrs, J. G. & I. N. Day, Cascade Locks, Oregon.

SIR: Your letter of the 20th inst. is at hand.

It is evident that the remarks made by me at the interview to which reference is made have been misconstrued. I did not consider it incumbent upon me to make a report of the expenditures incurred by the contractors on account of the flood of 1894, but told Mr. Day that the usual time for considering matters of this kind was upon the completion of the contract.

Very respectfully,

JAS. C. POST,
Major, Corps of Engineers, U. S. A.

Conclusion of Law.

Upon the foregoing findings of fact the court decides, as a conclusion of law, that the claimants are not entitled to recover, and

their petition is dismissed and judgment ordered to be entered in favor of the United States.

18 *Opinion.*

PEELLE, *Ch. J.*, delivered the opinion of the court.

The question for decision is whether under the contract and specifications made part thereof the claimants were thereby obligated to preserve in good condition without expense to the Government all work then in place; and in respect of the work to be done bidders were advised by paragraph 40 of the specifications that it was imperatively necessary for them to "visit the locality of the proposed work and obtain, from personal investigation, the information necessary to enable them to make intelligent proposals," of which personal investigation they were to advise the Government in their letter transmitting their proposals. This was done.

Paragraph 2 of the contract provides that "the party of the second part shall furnish such labor and material in place, and do such work, and discharge such other obligations connected therewith prescribed in the forementioned specifications, as may be necessary to complete the work of 'Improving canal at the cascades of the Columbia River, Oregon.'"

Paragraph 45 of the specifications provides that "the contract to be entered into will include all excavations and dredging, including the removal of the bulkheads, masonry, filling behind walls, grading and protection of slopes, the placing of irons, the construction of the gates and operating machinery, in short, the entire completion of the lock ready for use, as shown by the drawings and set forth in these specifications."

Paragraph 149 of the specifications provides:

"149. Responsibility for property.—The contractor will be held responsible, without expense to the Government, for the preservation and good condition of all the work now in place, and such as he may from time to time under this contract put in place, until the termination of the contract, or until the whole work is turned over to the Government in a completed condition, as required. This to include all material of every description on which full or partial payments have been made and all property belonging to the United States in the possession or control of the contractor."

Paragraph 152 of the specifications provides:

"152. The contractor's prices for the various items shall cover all costs of preparation for work, all costs of the materials and appliances in place, all transportation, preservation until termination of contract, and every expense of whatever nature which the United States would otherwise have to pay that may arise during the progress of the work or continuance of this contract, except contingencies for engineering and superintendance by the agents of the United States."

Such are the material and controling provisions of the contract and specifications.

The substantial facts found are that in May and June, 1894, while the work was in progress, a heavy flood arose, the water rising in the

river at the rate of an inch per hour until it finally reached from 4 to 6 feet above the highest known level, by reason of which it became necessary to protect the work then in place, which was done by the claimants, as averred, under the authority of the engineer in charge, by constructing a new and higher bulkhead over a line nearly 2,000 feet long and two temporary dams, at a cost to them, exclusive of any profits or of any compensation to them for services, of $37,465.35. Hence this action.

The work on the project, to complete which the contract herein was let and upon which the Government had expended over $1,850,000, was begun in 1878, and was continued under the direct charge of the Chief of Engineers, United States Army, until the advertisement for proposals in 1892, from which resulted the contract with the claimants herein.

The original project, the work of the engineers of the United States Army, was revised by them in 1884 with reference to the records of floods to that date; and protecting bulkheads had been constructed by the Government to an elevation of 142 feet, that being the elevation provided by the plans for the completed work. The project so revised was unchanged at the time the contract herein was awarded.

The defendants' contention is that by the terms of the contract and specifications the claimants were bound to protect the work then in place, though the flood should exceed the elevation of 142 feet; while the claimants' contention is that as the project and plans con-
19 templated an elevation of 142 feet at the time their contract was awarded, the work of protecting the bulkheads by increasing the elevation to 148 feet was outside the contract, for which the Government is liable upon an implied contract on quantum meruit.

The defendants base their contention on the paragraphs of the contract and specifications set forth, which obligated the contractor to furnish all the labor and materials necessary "for the entire completion of the lock ready for use," in the doing of which the contractor without expense to the Government, was to "be held responsible for the preservation and good condition of all the work now in place, and such as he may from time to time under this contract put in place, until the termination of the contract, or until the work is turned over to the Government in a completed condition, as required."

The act authorizing the continuance of the improvement of the canal of the cascades, as its title indicates, was "for the construction, repair, and preservation of certain public works on rivers and harbors," of which the claimants were bound to take notice.

It is apparent from the findings that as the work embraced within the claimants' contract was for the completion and preservation of the work under the project, they could not have completed the work under their contract without preserving as they did the bulkheads theretofore constructed by the Government for the protection of the work.

The question, therefore, is, Was the work performed within the contemplation of the parties when they entered into the contract? The project, which had long been matured, coupled with the claimant's knowledge of the flood levels prior to the date of the contract,

would at first seem to exclude the work from the contract. On the other hand, the claimants were bound to take notice of the uncertainty of floods, and if they had desired protection against the same, provision therefor should have been made in the contract; and not having been so made, and the doing of the work necessary "for the preservation and good condition of all the work now in place" being authorized by the act and embraced within the terms of the contract, the ordinary rules applicable to voluntary undertakings without qualification must be held to apply. That is to say, as was early held in the case of Dermott v. Jones (2 Wall., 1, 7): "It is a well-settled rule of law, that if a party by his contract charge himself with an obligation possible to be performed, he must make it good, unless its performance is rendered impossible by the act of God, the law, or the other party. Unforeseen difficulties, however great, will not excuse him."

In the later case of Chicago, Milwaukee & St. Paul Railway Co. v. Hoyt (149 U. S., 1, 14), the rule was stated thus: "There can be no question that a party may by an absolute contract bind himself or itself to perform things which subsequently become impossible, or pay damages for the nonperformance, and such construction is to be put upon an unqualified undertaking, where the event which causes the impossibility might have been anticipated and guarded against in the contract, or where the impossibility arises from the act or default of the promisor."

In the case of Jacksonville, etc., Railway Co. v. Hooper (160 U. S., 514, 527), and again in the case of United States v. Gleason (175 U. S., 588, 602), the same doctrine was announced; and so this court, in the case of Satterlee v. United States (30 C. Cls., 31, 51), in considering the same subject said: "If the law casts a duty upon a party, the performance will be excused if by the act of God it becomes impossible; but if a party engages to do something and fails to provide against contingencies the nonperformance is not excused by a contingency not foreseen and which by its consequence increases the cost and difficulty of performance. (Chitty, Contr., 272; 7 Mass., 325; 13 Mass., 94; Chicago R. R. Co. v. Sawyer, 69 Ill., 285; Am. Rep., 613)."

It is unnecessary to further cite authorities in support of a rule so well settled.

The most that can be said in the present case is that by reason of the rise of the water in the river above the elevation of 142 feet the claimants were put to much greater expense in the performance of their contract than they would have been had the flood not occurred. This may be a hardship, but it is one against which the claimants might have guarded by a proper provision in the contract.

The work, though necessitated by the act of God, was not thereby rendered impossible of performance. Hence, the work having been done, it can not be held that the flood rendered performance impossible. That the event might have been anticipated and guarded against requires no argument. The project showing the construction of the protecting bulkheads to an elevation of 142 feet can not be construed as a guaranty on the part of the Government that flood

waters would not exceed that elevation. The claimant had the same knowledge as to probable floods and their magnitude as the agents of the Government; and treating the flood of 1894 as an inevitable accident or contingency not foreseen would not excuse the claimants from performance if the work done were embraced within their contract.

(Beach on the Modern Law of Contracts, sec. 217.)

20 The claimants, however, contend that the language of paragraph 149 of the specification, holding them "responsible, without expense to the Government, for the preservation and good condition of all the work now in place," is ambiguous, and that as the contract was prepared by the agents of the Government the ambiguities therein should be resolved adversely to the Government; and that if so construed the claimants then would be held responsible for the preservation and good condition of such work only as against their own acts or other human agencies. This latter position is further sought to be maintained on the ground that because, as shown in Finding VI, the engineer in charge, immediately after the flood of 1894, recommended that the project be changed by increasing the elevation of the bulkheads to a height of 148 feet, which was done with the approval of the engineer in charge. This, it is asserted, was a construction by the officer of the Government favorable to the claimants' contention.

With this contention we can not agree. The language standing alone is not susceptible of such limited construction, and certainly not when considered in the light of the act authorizing the continuance and preservation of the work with the other provisions of the contract requiring "the entire completion of the lock ready for use," the prices for which, under paragraph 152 of the specifications it was therein provided, were to cover "every expense of whatever nature which the United States will otherwise have to pay that may arise during the progress of the work or the continuance of this contract, except contingencies for engineering and superintendence by the agents of the United States." That is to say, the claimants were not to be held responsible for the expenses of engineering and superintendence.

It would be difficult to surmise stronger language for the purpose evidently intended by the act as well as the contract. That is to say, as the Government was discontinuing the work on its own account the purpose in respect of the preservation and good condition of the work in place, as well as the continuance of the work, was to put the claimants in the place of the Government; and to that end it was provided, as before stated, that the claimants' prices for the work to be done, including the preservation and good condition of the work then in place, should cover "every expense of whatever nature which the United States will otherwise have to pay * * * except contingencies for engineering and superintendence by the agents of the United States."

If the work had been continued by the Government it would have

been compelled to increase the elevation of the protecting work, and as the claimants took its place the work fell upon them.

There is a suggestion that the protecting work was not necessary to the performance of the work under the contract. We think otherwise, and have so found; but whether necessary to enable the claimants to proceed with their work they were certainly bound to protect the "work now in place," for which they had agreed to be responsible to the United States. Upon this theory we must presume that the claimants took this into account in making their bid.

The thirteenth paragraph of the contract in terms prohibited the claimants from making any claim whatever against the United States on account of extra work "unless such extra work * * * shall have been expressly required in writing" and the prices and quantities were first agreed upon. This was not done, nor did the claimants demand it or protest against doing the work, and hence the acts of the parties in this respect, if the language of the contract were ambiguous, may be considered in determining the force and effect to be given thereto.

The claimants, as before stated, seek recovery on the ground that the work done was not embraced within the contract, but the language "held responsible without expense to the Government, for the preservation and good condition of the work now in place," can only be satisfied by holding the claimants responsible for the work done, otherwise the Government without authority of Congress therefor would have been compelled to resume the work of preservation at its own expense contrary to the language holding the claimants responsible therefor.

The exceptions stated in paragraph 152 exclude all others, and when that paragraph is considered with paragraph 149 of the specifications and other provisions of the contract there is no room for doubt; and thus believing, the claimants are not entitled to recover.

As after the filing of the demurrer herein to the original petition the claimants elected to amend, they thereby confessed that the demurrer was well taken, and the demurrer is therefore overruled, none being filed to the amended petition.

For the reasons stated the petition is dismissed and judgment ordered to be entered in favor of the United States.

21 VIII. *Judgment of the Court.*

At a Court of Claims held in the City of Washington on the 11th day of October 1915, judgment was ordered to be entered as follows:

The Court on due consideration of the premises, find for the defendants and do order, adjudge and decree, that the petition of the claimants, John George Day and Isaiah Newton Day, Partners under the firm name of J. G. and I. N. Day, be, and the same is hereby dismissed.

BY THE COURT.

22 IX. *Claimants' Application for, and Allowance of, Appeal, to the Supreme Court of the United States.*

Now comes the claimants by their attorney and move that, from the judgment rendered on the 11th day of October, 1915, an appeal be allowed them to the United States Supreme Court.

BENJ. CARTER,
Attorney for Claimants.

Filed October 12, 1915.

Ordered: That the above appeal be allowed as prayed for.

BY THE COURT.

October 12, 1915.

23 Court of Claims.

No. 21182.

JOHN GEORGE DAY and ISAIAH NEWTON DAY, Partners under the Firm Name of J. G. & I. N. Day,

vs.

THE UNITED STATES.

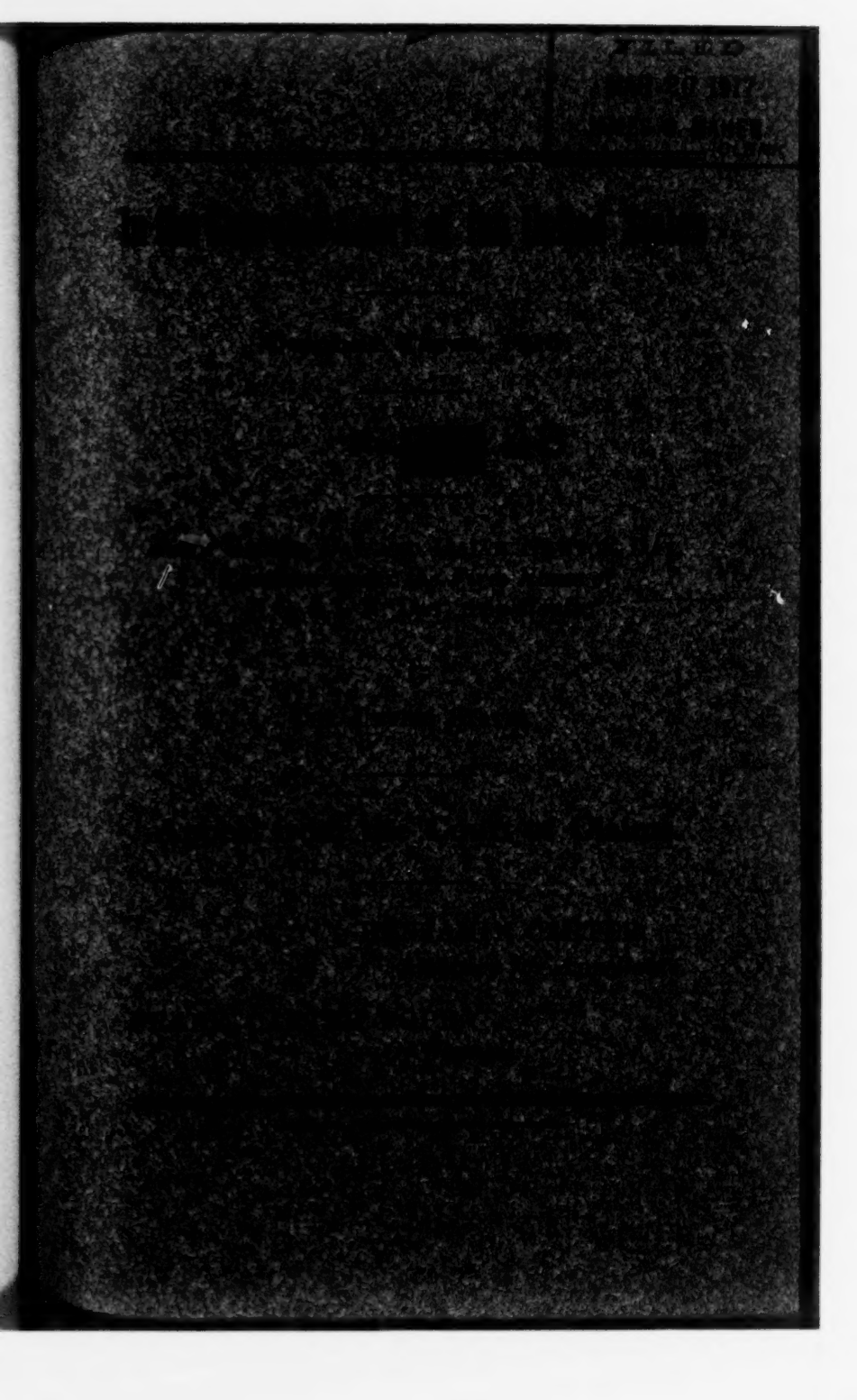
I, Samuel A. Putman, Chief Clerk of the Court of Claims, certify that the foregoing are true transcripts of pleadings in the above-entitled cause; of the history of proceedings; of the argument and submission of the case; of the findings of fact and conclusion of law and opinion of the Court; of the judgment of the court; of the application of the claimants for, and the allowance of, an appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court of Claims at Washington City this 10th day of November, A. D., 1915.

[Seal Court of Claims.]

SAM'L A. PUTMAN,
Chief Clerk Court of Claims.

Endorsed on cover: File No. 24,988. Court of Claims. Term No. 284. John George Day and Isaiah Newton Day, partners, under the firm-name of J. G. & I. N. Day, appellants, vs. The United States. Filed November 11th, 1915. File No. 24,988.



SUBJECT INDEX.

AUTHORITIES CITED.

AUTHORITIES CITED—(*Continued*).

In the Supreme Court of the United States

OCTOBER TERM, 1916.

JOHN GEORGE DAY AND ISAIAH NEWTON DAY, *Partners under the Firm Name of* J. G. & I. N. DAY, *Appellants,* } No. 284.

v.

THE UNITED STATES, *Appellee.*

APPEAL FROM THE COURT OF CLAIMS.

Statement.

In the suit which has been brought from the Court of Claims by this appeal the claimants (appellants here) claimed compensation for expenses suffered and personal services rendered in superimposing some three feet of construction on a bulkhead or wall which had been built by the Government in front of and around the site of a lock and dam at the Cascades of the Columbia River, the wall being broadened and also reinforced in the process. The lock and dam had, at the time complained of, been in the course of construction some sixteen years and over a million-and-three-quarters dollars had been expended on the project, but it still was far short of completion.

The purpose of the wall referred to was to prevent inundation of the work by floods, which occur more or less regularly every spring in the river. (Finding III, Rec. pp. 14, 15). In this instance, in May and June, 1894, though after the regular spring flood had subsided, the water rose nearly six feet above the highest recorded level. It became evident that the wall, as it stood, would fail of its purpose. Appellants, who had a contract to continue the construction work on the lock and dam, had suspended operations on account of the spring flood; but their plant was still on the ground, and the Government's local engineer in charge, therefore, requested them to do the salvage work indicated above. The work was done by constant labor, much of it by night, during some ten days. It prevented any flooding except by back water below the bulkhead, and saved the project from certain destruction.

The cost and expense to appellants of performing this emergency work, including a reasonable profit thereon and the value of personal services rendered, was $41,711.88. (Finding VI, Rec. pp. 16, 17).

The District Engineer of the Government, having his office in Portland, visited the Cascades, saw and approved what was done, and gave appellants to understand that a separate estimate would be given to pay them for this work. (Rec. p. 17).

The Corps of Engineers, having this project in hand since 1878, had prosecuted it somewhat sporadically. The work had been done sometimes by contract and sometimes, under immediate direction of the engineers, by day labor. The decision was finally reached that for economy of energy and expense the project should have a caste of permanence and continuity. A new and thorough study was made of all of the climatic and topographical conditions, and an elaborate plan was drawn by Lieut. Burr, the local engineer then in charge, which was approved by his superior officers and was printed in the report of the Secretary of War for the year 1891 (part 5) at pages 3360, *et. seq.* In connection with this plan Lieut. Burr submitted an estimate of the cost of completing the improvement so defined. A special objective in this plan was to surround the site with a wall or dam so high as to never be overflowed by the periodical rises of the river. It was recognized that if the contractors were thus insured against interruption and damage, the Government could obtain lower prices for the work. In this view a height of 142 feet above an assumed base line was fixed for the wall, this exceeding by nearly three feet the highest known level of the water, which had occurred in 1876. (Before 1876, the highest water level of record had been 137.9 feet in 1880, and 136.8 in 1882, measuring from the same datum plane. Record p. 15.) To this projected height the wall had been built by the Government, and,

as expected, it had saved the entire site from flooding. (Senate Ex. Doc. No. 72, 51st Congress, 2nd Session).

This was the situation when, in 1892, under specific appropriation of Congress, bids were received by the engineer in charge and the contract awarded to appellants, who were the lowest bidders. Following is the text of the appropriation:

> "Improving canal at the Cascades of the Columbia River, Oregon: Continuing improvement, three hundred and twenty-six thousand two hundred and fifty dollars: Provided, that contracts may be entered into by the Secretary of War for such materials and work as may be necessary to complete the present project of improving of the Columbia River at that point, to be paid for as appropriations may from time to time be made by law, not to exceed in the aggregate one million four hundred and nineteen thousand two hundred and fifty dollars, exclusive of the amount herein and heretofore appropriated." (27 Stat. L. Ch. 158, p. 109).

The specifications of the contract provided, as to each appropriation, that the work required to earn the full amount so available should be completed within a year from the date when the funds became available. (Reports of Chief of Engineers, being Vols. 2, of Reports of Secretary of the Treasury: 1894, Pt. 4, p. 2646; 1895, Pt. 5, p. 3568; 1896, Pt. 5, p. 3267; 1897, Pt. 4, p. 3417).

In his next report following the salvage work Major Post said nothing relative to appellants' compensation therefor. The correspondence then

ensued which is set out in the findings of the Court of Claims (Record p. 17). In that Major Post explained what he had previously said, or intended to say, to Mr. J. G. Day, viz: that the proper time for a matter of that kind would be at the completion of the contract work.

In a report of date January 17th, 1894, Major Post pointed out that, to provide against such abnormal floods as that of the previous summer, it would be expedient to recast the entire project, including both the permanent works and the protecting wall which would be required throughout the operations,—incidentally reciting the tremendous labors of appellants by which the existing construction had been preserved. At his suggestion a board of engineers was appointed, who after full consideration, recommended, along with some change and expansion in the project, the adoption of an elevation of 148 feet from the existing base, to which first, the protecting wall, and finally the outer wall of the lock itself should be built. Major Post thereupon made another report in which, while submitting estimates for each part of the additional work proposed, he pointed out that all of this was outside the contract under which appellants were operating. In his estimate and recommendation he also included the repairing of the small damage that had been done by the flood in spite of appellants' exertions. (Report *sup.* for 1895, pp. 3572, 3574-3577, 3581, 3582).

These recommendations were carried along in the engineer's annual reports until Congress made appropriations and the work was done. The

repair work was covered by a supplemental contract with these appellants. The raising and reinforcing of the protecting wall to the new height was also done by them in part under an "open market" arrangement, after Major Post had decided that it was unfeasible to open the work to competitive bidding, and in part was done by day labor employed by the Government. (Reports sup. 1897, p. 3418; 1898, Pt. 4, p. 2981). Then, during parts of two fiscal years, the work was carried on by day labor hired directly by the Government. In September, 1899, a contract was let one to Hosea W. Taylor. This contract covered rebuilding of the broken embankment, repair of the slope wall which formed the bank of the lock on the side toward the river, and some riprap work and paving for the protection of the completed masonry. (Reports of Chief of Engineers; for 1899, Pt. 3, p. 3223; 1900, Pt. 6, p. 4324).

ASSIGNMENT OF ERRORS.

It is hereby assigned as error committed by the Court of Claims:

(1) That the petition was dismissed.

(2) That the court, interpreting the contract which existed between the claimants and the United States, held that claimants were bound thereby to perform at their own expense the work for which they here claim compensation from the Government.

(3) That, having so construed said contract, the court did not reform the same, as prayed in the petition, to the effect of putting upon the Government the expense of the said work for which compensation is claimed.

(4) That compensation for said work was not awarded to the claimants either upon the basis of salvage of imperilled property of the Government or upon the basis of expense suffered and personal services rendered by the claimants.

(5) That judgment was not rendered for claimants on the facts in the sum of $41,711.88.

LAW POINTS AND AUTHORITIES.

1. An agreement between two persons which binds the freedom of one alone is not a contract.

Dorsey v. *Packwood,* 12 How. 126 (136).
Rutland Marble Co. v. *Ripley,* 10 Wall 339, (359).
Coalblast Transportation Company, v. *Kansas City Bolt & Nut Co.,* 114 Fed. 77.
Columbia Wire Co. v. *Freeman Wice Co.,* 71 Fed. 302 (304).
Vogel v. *Pekoc,* 127 Ill. 239.

2. Where two persons sign an instrument in which prices for goods or services are fixed and one party agrees to furnish the same when they shall be needed by the other party, a contract or

contracts arise when the other party calls for supplies of the goods or for performance of the services, not before; the instrument, until such requisitions are made, is nothing more than a tender.

Johnston v. *Trippe,* 33 Fed. 530.
Holtz v. *Schmidt,* 69 N. Y. 253.
Willetts v. *Sun Mut. Ins. Co.,* 45 N. Y. 45.
Wisconsin etc. Rd. Co. v. *Braham,* 7 Io. 484.
Ross v. *Parks,* 93 Ala. 153.
Great Northern Rd. Co. v. *Witham,* L. R. 9 CP. 16.

3. When, after the signing of a contract, the subject matter thereof is destroyed or, by any event not foreseen by the parties, performance has been rendered impossible, the parties are released and no liability occurs of one to the other.

Jacksonville etc., Ry., v. *Cooper,* 160 U. S. 525.
Chicago, Milwaukee & St. Paul Ry. Co. v. *Hoyt,* 149, U. S. 1.
Western Hardware Co., v. *Bancroft-Charnley Steel Co.,* 116 Fed. 176.

4. If the performance of a contract is rendered impossible by an event which the parties might have anticipated but of such a character that it cannot be supposed to have been contemplated by them, they will not be held bound by general words which, though large enough to include, were

not used by them in reference to the possibility of that particular contingency; the dry words of contracts must yield to the intentions of the parties.

Chicago, Milwaukee & St. Paul Ry. Co. v. *Hoyt,* sup.
Reid Insurance Co. v. *United States,* 95 U. S. 23.
Kauffman v. *Reeder, et al.,* 108 Fed. 171.
Fox v. *Tyler,* 108 Fed. 258.

5. When a contract provides for completion of a structure upon foundation already constructed, or entire construction upon native earth as a foundation, at a specified level to which the contractor was to excavate, and it is infeasible to build upon such foundation, the contractor is not obliged to create a new foundation, and, upon so doing, is entitled to be compensated therefor.

United States v. *Gibbons,* 109 U. S. 200.
Wyandotte Railway Co. v. *King Bridge Co.,* 100 Fed. Rep., 196.
Collins & Farwell v. *United States,* 34 Ct. Cls. 294.
Christie v. *United States,* 237 U. S., 234.

6. If in a contract for construction of a public improvement there is described and specified a subsidiary structure or device for protection of the work against flooding or other damage from

the elements, the sufficiency of that device is in effect guaranteed to the contractor and he is entitled to compensation for any expenses suffered by him in protecting the work against injury caused by the failure of the device.

United States v. *Gibbons*, supra.
J. Hampton Moore, Receiver, v. *United States*, 46 Ct. Cls. 139.
Christie v. *United States*, supra.
Spearin v. *United States*, 51 Ct. Cls., 155.

7. In a suit in reference to a contract that interpretation is to be preferred which the parties themselves put upon the contract in the course of its performance.

District of Columbia v. *Gallaher*, 124 U. S., 125.
Insurance Co. v. *Dutcher*, 95 U. S., 269.
Old Colony Trust Co. v. *Omaha*, 200 U. S., 100.
Topliff v. *Topliff*, 122 U. S., 121.
Fitzgerald v. *First National Bank*, 114 Fed. Rep. 474.

8. When a contract has been written by one of the parties any ambiguity in its terms should be resolved in favor of the other party.

Noonan v. *Bradley,* 9 Wallace, 394.
Garrison v. *United States,* 7 Wallace, 688.
Otis v. *United States,* 20 Ct. Cls., 315.
Hill v. *John P. King Mfg. Co.,* 79 Ga., 105.
Schmol v. *Fiddick,* 34 Ill. App., 190.
Randel v. *Chesapeake & Del Canal Co.,* 1 Har., 151.

ARGUMENT.

Obviously this case turns upon the interpretation of the contract which was awarded to the appellants under the rivers and harbors act of July 13, 1892, (27 St. L., Ch. 158, p. 109). The Government's engineers before framing and letting this contract had constructed around the site of the work a protecting embankment or bulkhead, assumed to be sufficient in height and in structure to prevent flooding by any rise of the river. It has been contended on the Government's part, and decided by the Court of Claims, that appellants in taking their contract assumed all risk as to the sufficiency of this protecting structure; appellants, *per contra,* contending that this risk was upon the Government.

Appellant's position, stated a little differently, is that they were invited by the Government to come behind an enclosing and protecting wall and there, upon half-built walls and other construction as foundations, to impose masonry of certain kinds and quantities, and that if, through no fault of

appellants themselves, this protecting device should fail of its purpose, or if the foundations of the permanent work should prove insufficient to carry the specified burdens, or, being sufficient, should in some way be destroyed, the loss and expense, and therefore the expense incurred in preventing such damage, was to fall on the Government.

While not so interpreted by the engineer officers (Four distinct contracts, commencing with the one here in question, were awarded before the work was completed) it might be conceded on appellants' part that they had bound themselves to furnish the materials and do the whole work as rapidly as funds should be provided by Congress. It does not follow, however, that during all of the years that might elapse before Congress should be pleased to complete the project as designed by the engineers, appellants were to stand by and fortify or rebuild a protecting wall and otherwise save the work from injury from the elements or other fortuities. Such an arrangement as this would have been void for lack of mutuality; for the Government would not be bound to any certain time or rate of operations for completion of the work, nor indeed to complete it in any time whatsoever. The rule of reasonable time, so often attaching by implication to contracts of individuals, could not apply here; Congress being the sole judge of the reasonableness of the time or any other incident of a public improvement (No testi-

mony of contractors, experts or any witnesses whomsoever would be admitted in any court in such a contest to establish that Congress had not in a reasonable time made provision for the work). The contractors, or their estates after their deaths, would simply have been bound for an indefinable length of time to care for the uncompleted project and to carry it to ultimate completion. All of this seems to have been understood by the army engineers. Unquestionably they accomplished all that could be done when they bound the contractor to prices and other conditions upon which at their (the engineers,) call, following upon appropriations by Congress, the work should proceed until the funds should be exhausted.

The engineers really acted upon the view that, beyond the construction for which the appropriation of July 13, 1892, *supra,* provided, the contract signed with appellants did not bind either party. Appellants' time for that particular work was extended to June 30, 1896. An additional appropriation having been made by Congress, appellants nevertheless were not called on nor permitted to take the work up again under the original contract; a new contract including some of the construction contemplated in the other contracts, in addition to some for which provision had been made by the revised project framed by the engineers after the flood of 1894, was signed with them, and then, after an interval of day-labor work, another and final contract upon the same subject

matter was given to another individual. Nothing was done at any time to indicate any understanding or opinion of the engineers that appellants were to safeguard the word from flooding, during intervals between appropriations, nor indeed during their own operations. The fact is that *never until Major Post, the engineer in charge during the operations, was dead, was it suggested in any responsible quarter that the risk of floods was upon appellants and that they were not lawfully entitled to be paid by the Government for what they did in prevention of injury by a flood.*

The Express Terms of Appellants' Undertaking.

In undertaking to determine what appellants were obliged to do under their contract, the language of the contract itself, including the specifications, is the first subject for discussion.

The general description of the work included in the specifications is as follows:

> 45. Contract to Include. — The contract to be entered into will include all excavations and dredging, including the removal of the bulkheads, masonry, filling behind walls, grading and protection of slopes, the placing of irons, the construction of the gates, and operating machinery; in short, the entire completion of the lock ready for use, as shown in the drawings and set forth in the specifications. (Record p. 11).

Here, it will be seen, there is no mention of bulkheads except with respect to their removal upon the completion of the work. That, of course, was a part of the cleaning up which could be done more conveniently and economically by the contractors than by any one else.

"The bulkheads" (not "bulkheads") meant those that the Government had already provided as sufficient.

The word "protection," of course, is used in the mechanic's sense, meaning the covering of the slope walls of the canal (earth) with the masonry specified in the other paragraphs. This word *does not occur anywhere else in the specifications or contract.*

The particulars upon which bids were to be taken and the contract awarded were set out in another paragraph of the specifications, as below:

> 152. The contractor's prices for the various items shall cover all costs of preparation for work, all costs of the material and appliances in place, all transportation, preservation until termination of contract, and every expense of whatever nature which the United States would otherwise have to pay that may arise during the progress of the work or continuance of this contract, except contingencies for engineering and superintendance by the agents of the United States." (Record p. 18).

In paragraph 43, (Record p. 10) of the specifications the work is itemized and the approximate

quantities of material stated, and details of the manner of doing the work are contained in other sections; and in none of these provisions is there a word applicable to the existing buldheads and their materials or the method of their reconstruction in the event of injury. It is common knowledge that in contracting for public improvements the Government's agents plan for dispatch of the work as well as for the good character of the materials and workmanship. In this case, it will be observed, the engineer in charge of the construction fixed one year as the time to do work for which, as it turned out, three years were required. No more serious cause for delay could be imagined than the breaking down of such a bulkhead as had been constructed to save this particular project from flood. Naturally, then, the chief concern of the Government engineers, if such a breakdown had been imagined, would have been to take security against a recurrence of the catastrophe, and that they would have accomplished in advance by specifying, for reconstruction of the bulkhead, materials and methods of placing which would rob all future floods of their terrors. If the view taken by Government counsel and by the Court of Claims were correct—if the parties took into account the chance that the work might be submerged—the matter could hardly have been ignored in the conversations between the engineer officers and intending bidders; and to make good this theory upon which the case is defended it must be assumed that at these interviews the engineers said

to the contractors that specifications for reconstruction of the bulkhead, upon occasion, had been omitted because that was to be the contractors' burden and of no importance to the Government; that the Corps of Engineers did not care how much time might be consumed in the work and should not feel that the Government's interests were affected even though the bulkhead might be broken down or overflowed and the incomplete work washed out time and time again, so that twenty years might be required to the normal work of two years. That such a thing was said or intended, or was ever in anybody's mind, is unthinkable. It is clear, we submit, that all consequences of a submergence of the work were ignored because it was accepted that the bulkhead had made submergence impossible.

As we have said, the removal, upon completion of the project, of the enclosing bulkhead, constructed largely of earth, would involve comparitively little expense to the contractor; yet the engineers saw fit to specify that as a part of the work, to the end that the bidders should not make their unit prices for the work of construction (which was all the contractor was to receive) too low. Restoration of the completed work and of the bulkhead itself in the event of flooding would be a very different thing, a very large item of expense even though it should not occur more than one time. The irresistible conclusion, we submit, is that, when the engineers in their invitations

for bids and their specifications omitted to admonish bidders of this very important contingency, they did not have that contengency in mind as pertinent to the cost of the work to the contractor.

On this latter point we are not left to conjecture. The engineer reports speak in unmistakable terms.

The cost of this project had been estimated by Lieutenant Burr, the engineer locally in charge, in 1891. The actual cost to the Government of the work done to date, most of which was done by day labor and did not involve any profit to contractors, was taken as a basis and from this Lieutenant Burr computed the unit cost of the several classes of work. These basic figures did not involve any risk carried against, nor repair of damage done by floods. Obviously then, if prices were to be made for the future work on the assumption that the contractor was to carry this risk, the figures would be considerably higher than Lieutenant Burr's. The classes of work mentioned in Lieutenant Burr's computation and in these bids being the same, comparison is not difficult. The bids made, (for the completion of the project) except possibly one, figure out an aggregate lower than Lieutenant Burr's estimate. Appellants' bid on this was some $223,000.00 below the estimate. It is especially significant that the comparatively high prices in the bids, when contrasted with Lieutenant Burr's figures, are on items of solid masonry (in place) which could

not have been greatly damaged so as to call for very expensive repairs in case of flooding. The low bids were on sand, gravel, cement, both embankments, etc., such things as it would be necessary to repair absolutely after a flood. (Reports; 1891, 2 Pt., p. 3360; 1893, Pt., 4, p. 3509).

The reports of the engineers on this project, from 1884, when it was designed, on down to 1893, spoke of the economies to be effected by putting the entire work into one contract, and no where do they speak of what, on the Government's present theory of this contract, would have been the crowning economy, to-wit, the imposing on somebody else of the restoration of the work in the event of flooding. If the Government's representatives had intended to contract, and deemed that they did contract for this important thing, it would be reasonable to expect to find some statement or indication to that effect in their official declarations.

The Court of Claims concludes that another paragraph (No. 149) of the specifications beside those to which we have referred above put upon the contractors the risk of the bulkhead's sufficiency. Following is the text of that paragraph:

> "Responsibility for property.—The contractor will be held responsible, without expense to the Government, for the preservation and good condition of all work now in place, and such as he may from time to time under this contract put in place, until the termination of the contract, or until the whole work

> is turned over to the Government in a completed condition, as required. This to include all material of every description on which full or partial payments have been made and all property belonging to the United States in the possession or control of the contractor." (Record p. 18).

There is no difficulty in interpreting this paragraph if it be remembered that the contract itself, in order to give it validity, was to be read as requiring the contractors' presence upon the work at times only when there was money appropriated by Congress for prosecution of the work and they had been summoned by the engineers to proceed in ways, and for prices, fixed by the contract. The contract, however, covered all the work that remained to be done and that would be done under successive appropriations; and if it had been intended that the contractors, as regards the saving of the work from flooding, were to carry a responsibility at times when they were working which they would not carry during the cessations of work, awaiting appropriations, the engineers would hardly have failed to write in some stipulation to that effect.

There is nothing unusual in a stipulation that a contractor employed upon contract work should safeguard against intrusion from outside and from negligence of his own employees the work he had done himself and the partly-done work upon which he was building as foundation. It would be very unusual and remarkable if the contractor was ex-

pected to preserve, and if necessary, to replace, against a contingency not suggested anywhere in the contract, a completed wall, which being one of the necessary appliances, was a datum of the contract.

Probably it will be conceded that if this record-breaking flood had not occurred until after these appellants' original commission had been performed and their operations suspended to await another appropriation, they would not have been bound to go back and fight off the flood or, in default of that, to repair such damage as it might have done (In fact they were not held to any responsibility during intervals, the Government taking the project in hand between contracts, looking after its preservation and doing such construction as the small balances of moneys in hand made possible, by day labor). Then it cannot be said that these contractors stepped into the shoes of the Government, taking all the chances affecting the completion of the work.

The opinion of the Court of Claims comments also on the stipulations that bidders upon this work should visit and examine the site. The court will recognize that these are stipulations usually made by Government officials in such cases. This matter, in the present instance, was covered by two paragraphs, viz: one in the "General Instructions for Bidders" (No. 3) and one (No 40) in the specifications themselves. (Record pp. 9 and 10).

The latter of these is the more specific of the two. Following is its text:

> "It is imperatively necessary that bidders or their deputed representatives visit the locality of the proposed work and obtain, from personal investigation, the information necessary to enable them to make intelligent proposals, as the United States will not be responsible for any lack of accurate information on the part of the contractor regarding the work to be done. It is not considered possible for bidders to make intelligent proposals, without having information to be obtained only by visiting Cascade Locks. Bidders will state in a letter transmitting proposal whether these investigations have been made."

This requirement did not signify that any disadvantage, beyond delays, was to fall on the contractor in case of floods. It did even enjoin bidders to examine the bulkhead and judge of its sufficiency. If it was intended that they should concern themselves with this question, they naturally would have been referred to the reports of the engineers and of the Coast and Geodetic Survey. Those documents would have told them what the height of the previous floods had been and so enabled them to judge the height and weight of water against which this bulkhead would have to forfend. Nothing that they could see at the site of the work could aid them to a correct judgment on this point. What they were to learn, obviously, by this visual inspection was the nature

of the material in which they were to excavate, the somewhat peculiar topography, affecting the bringing-in of materials, the sufficiency of the Government sheds and other arrangements for cutting stone, mixing cement or doing other work during bad weather, etc.

In reality, therefore, these stipulations import that the sufficiency of the bulkhead was regarded as settled, as a thing to which intending bidders were to give no more thought than they were to give to the qualities of the various materials specified for the construction of the lock and dam.

The word "weather" in this third paragraph of the specifications has no relevancy to this controversy. This word is used in relation solely to the probable expense of prosecuting the work, and that would not necessarily be one dollar more in the case of a freshet, such as was to be expected in that country, than in the case of a continued rainfall not heavy enough to cause a freshet. Of course, too, in the matter of the existing soft work, rain or snow fall was to be taken into account: that is, "weather"—rain, snow, freeze, heat, etc. "Weather" is not the word for a cataclysmal downrush, under the clear skies of summer, of waters that, as rain or snow, had fallen weeks or months before. It was not "weather" that broke dams, killed hundreds of people and destroyed property worth millions of dollars at Johnstown, Pennsylvania, and at Galveston, Texas, in recent years.

The True Intention of the Contract.

From the above analysis it doubtless will be clear enough that safeguarding of the project against flooding was not included in, named by, any phrase of the specifications and contract under review. But if this be not true, it is evident that this is not the sense in which the parties used the words.

The argument for the Government is that by the strict words of the contract appellants were compelled to do construction which, in case the work was flooded and washed out, would be impossible, and that this was a contingency which appellants should have foreseen. A sufficient answer to that is found in the following from the opinion of this court in the *Chicago, Milwaukee & St. Paul Railway Co.* v. *Hoyt,* 149 U. S., (pp. 14-15):

> "There can be no question that a party may by an absolute contract bind himself or itself to perform things which subsequently become impossible, or pay damages for the non-performance, and such construction is to be put upon an unqualified undertaking, where the event which causes the impossibility might have been anticipated and guarded against in the contract, or where the impossibility arises from the act or default of the promisor. But where the event is of such a character that is cannot be reasonably supposed to have been in the contemplation of the contracting parties when the contract was made, they will

> not be held bound by general words, which though large enough, were not used with reference to the possibility of the particular contingency which afterwards happens."

The parties to the contract before the court in that case necessarily had foreseen the identical difficulty which arose, viz: the inability of an elevator company to store grain delivered to it by a railroad company in accordance with the contract; and this was a difficulty which the elevator company itself, by failing to provide storage room, had in the view of the law, created. The case is in no wise akin to that of a providential accident such as the parties did not think of as possible.

In *Reid* v. *Insurance Company,* (95 U. S., 23), the subject of the dispute was an insurance policy containing a special clause that the risk was to be suspended while the vessel was at "Baker's Island loading." The court, after quoting from several decided cases, said, (pp. 31-32):

> "The principles announced in these quotations, with the limitations and cautions with which they are accompanied, seem to us indisputable; and, availing ourselves of the light of the surrounding circumstances in this case, as they appeared, or must be supposed to have appeared, to the parties at the time of making the contract, we cannot doubt that the meaning of the words which are presented for our consideration is that the risk was to be suspended while the vessel was at Baker's Island for the purpose of loading, whether

> actually engaged in the process of loading or not. Taking this clause in absolute literality, the risk would only be suspended when loading was actually going on. It would revive at any time after the loading was commenced, if it had to be discontinued by stress of weather, or any other cause. * * * The whole reason of the thing and the object in view point to the intent of protecting themselves whilst the vessel was in that exposed place for the purpose referred, to not merely to protest themselves whilst loading was actually going on. * * *"

Further illustrations of this familiar rule of the law are cited at page 9 *supra*.

So much for the interpretation of the contract by its written terms and the facts among which it was written. There is another reason of compelling force, we submit, for not adopting that view of the contract which the Court of Claims has taken, viz: the acts of the parties themselves by which the contract was performed.

The Parties' Interpretation.

There is no better established rule, we assume, than that a court, when called upon to interpret a contract, will be guided by the interpretation the parties themselves have put upon it during its performance, unless that be irreconcilable with the language employed in the instrument.

As has been said already, the idea that this contract put on the contractors the chances regarding

the flooding of the work was born after the death of Major Post, the engineer who prepared the contract, and under whom it was administered. There is not a line nor a word in the engineer reports of the years in which this project was carried out which even hints at any such responsibility on the part of the contractor. On the contrary the record of the transaction is full of the clearest intimations that this risk was on the Government.

It is evident that very soon after this salvage work was done Major Post had a conversation with one of appellants in which he definitely recognized the Government's liability to pay for the work. Major Post being dead, the trial court, for proof of his views, was relegated to the writings to which he was a party. Among these was a letter written to him by appellants on April 20, 1895, and his reply to it dated two days later (Record p. 17). As shown by these letters the subject of the conversation was the mere estimating of the compensation due appellants, not the fact of the Government's liability therefor (this latter having been recognized all the while) and appellants wrote their letter to point out that Major Post in his annual report had not made any estimate on this head. In replying Major Post explained that this had been omitted because the time for things of that kind was "upon the completion of the contract."

This position of Major Post was reasonable enough, in view of decisions of the Court of Claims

and of this court. It is unmistakably clear, however, that when writing this letter, as well as when he first talked with appellants on the subject, Major Post intended to pay them at the proper time for this work; and no reasonable mind can doubt that, if he had lived and had remained in charge of the project, he would have paid them.

The formal communications of Major Post show, and with equal clearness, the same understanding of appellant's rights which he had expressed to them.

First of all, when reporting the award of the contract to these appellants, Major Post said:

> "This provided that as much of the Government plant as might be required for the prosecution of the work was to be turned over to the contractors, and that the amount appropriated for the work was to be earned within one year from the date of the contract or within one year from the date of the Act appropriating each amount. (Engineer Reports for 1894, Pt. 4, p. 2646)."

In this report it is explained that the amount stated in the contract was based upon estimated quantities of materials required for completion of the work, and this is added:

> "It is highly probable, however, that the actual quantities required will in many cases exceed this estimate." * * * "Should this occur, additional appropriations will be needed to meet this liability." (Ib. p. 2646).

Surely there is nothing here to suggest that there was any unusual obligation on the contractors except (impliedly) to take care of the Government plant used and to do within one year all the work to which they should be called. What is said regarding the cost of the work is highly significant, on the contrary, of the elimination of all question regarding damage to the existing work by flooding. It was pointed out that there might be some increase over the indicated cost because the quantities of materials might have been underestimated. It is *not* said that contract prices of these materials were high because the contractors were to carry the risk of flood. (As shown above, the prices were *not* high). It is inconceivable that the contract should have been understood as including this highly important agreement for saving the work against floods and nothing should have been said of that in the contemporaneous report.

In the same paper, in reference to the consequences of this unprecedented flood, it was said:

> "Some damage was done at the lower end of the canal by the violent waves and currents during the high water, and a statement of this, as well as the modification made necessary by reason of the recent experience, will be made the subject of a special report as soon as the water falls sufficiently to ascertain the condition of the entire work." (Ib. 2647).

There is no intimation here that the damage described was the contractor's loss; and the con-

sideration already given to better protection of the work in future shows clearly enough the understanding of the parties that the Government alone was concerned with that.

In his report of August 30, 1895, Major Post, speaking again of this flood, said:

> "Fortunately the work was still incomplete and a large force of laborers was available. These were immediately employed in raising the bulkhead and in building a dam connecting the bulkhead with the high bank on the south of the canal and a second dam to connect it with the river bank north of the canal, the latter being extended, as was necessary from time to time, down stream along the river bank. When the water reached its highest stage this protection line was about 2,600 feet long, and it was only through great exertion and by working day and night for more than a week that it was possible to keep in advance of the rising river and prevent the river from overflowing the dams, embankments and bulkhead and rushing through the canal." (1895 Reports, Pt. 5, p. 3572).

The report then goes on to describe the damage which had occurred.

In the report of the Board of Engineers, appointed in pursuance of Major Post's suggestion for the betterment of the protecting devices, it was said, after a reference to this flood of the year before:

> "While the actual damage was almost insignificant, yet the flood demonstrated the necessity for the following modifications in details of the protection works, which modifications are recommended by the Board." (Ib. 3577).

Again it was assumed that the actual damage was the Government's loss, not the contractor's.

It will be observed that in Major Post's history of the emergency work the contractors are not mentioned. The natural inference from what he says is that the work was done by the Government itself for its own account; and in fact these appellants might reasonably enough be regarded as mere agents of the Government in doing this particular work.

Not the faintest hint is there to this point, we repeat, that it was these appellant's duty to maintain the bulkhead, and save the work from flooding, at their own expense; and engineers who thought they had relieved their government of such a burden would have used with all propriety some words of self-gratulation.

In his second report, dated December 17, 1894, upon the report of the Board of Engineers, as a text, Major Post seconded the recommendations of the Board for the construction of a second lock, for building up both the slope walls of the lock chambers and the protecting bulkheads some feet higher, for some other minor changes, and for repair of the damage that this flood of the summer before had done; and he then said:

"The act of Congress of July 13, 1892, provided for the completion of the existing project, and under this act the contract for completion of the work was made. Anything that relates to the modification of the project cannot, therefore, be said to be authorized by Congress or contemplated in the present contract * * * Of the work proposed herein only the restoration of the damaged slope walls with cement properly belongs to the present project, and it is possible to undertake this under a supplemental agreement with the contractors. The remainder of the work proposed, the river protection wall, the raising of all protection walls an additional height of 6 feet, and the erection of the walls of the second lock are additions to the project, for which authority of Congress seems necessary." (Report for 1895, Pt. 2, p. 3581).

The report ended with an estimate upon the various kinds of work recommended. The estimate was under two major heads, viz: (1) "Repair and preservation of existing work" and (2) "Modifications required to increase navigable capacity of canal"—the first head covering nine items of damage-repair or of betterment of the protecting works.

The distinctions here made by Major Post between the different parts of the contemplated future work are easily understood. The new lock, with its appurtenances, the river-protection wall and the added height to the "protection walls." (the bulkheads) were not "contemplated in the

"present contract" nor in the authorization therefor. Repair of the damage was within the authorization, but was not within the project covered by the contract. Being authorized, it could lawfully be done to the extent of the funds in hand without any new legislation; and to some extent it was so done.

Congress adopted without question Major Post's view of appellants' contract. Following the second recommendation made by him (Report for 1896, vol. 2, p. 3268) it voted the money for a part of the work recommended under the head of "Repair and preservation" etc., and in other appropriations it provided for the remaining work of that character and for the construction required by the modification of the project. (Stats. L; vol. 29, Ch. 314, p. 2333; vol. 30, Ch. 425, p. 1148; vol. 31, Ch. 1079, p. 1902).

The observations of Major Post last quoted, as regards the "repair" work, mean that under the authority given by Congress he might have let a contract to include safe-guarding of the work against floods but that, in fact, he had not done so.

In short this contract of the Days was performed upon the understanding of themselves, of the Government engineers, and of Congress, that they (Days) were to do, at times when they should be called by the engineers, the construction work needed to complete the project as designed when the contract was taken; and that as to the safety

of the site and any damage resulting from the insufficiency of the protecting structure, the responsibility and expense should be upon the Government.

Ambiguities Are to be Resolved Adversely to the Author of a Written Contract.

This canon also of the law of contracts is thoroughly well established. It has been applied by this court to what may be called an extreme length as compared with this case.

In *Garrison* v. *The United States,* 7 Wall. 688, dealt with a contract prepared and let by Major General B. F. Butler for furnishing rifles to his command. An amendment had been inserted in the contract permitting the contractor to furnish Enfield instead of Liege guns and the contract was ambiguous, as this court held, with respect to the price of the substituted gun. General Butler's authority for these purchases had been limited by the Secretary of War to prices paid by the Government for arms of the same respective makes. The contract price of the Liege gun was $27.00 and the current price of the Enfield gun was $20.00. This court, reversing the decision of the Court of Claims, held that since General Butler had written the amendatory clause himself, and had not written it in clear terms, the Government should pay for the Enfield guns the contract price of the Liege guns.

This rule of law has been applied by the Court of Claims in *Otis* v. *United States,* 20 Ct. Cls. 315; *Gantz* v. *United States,* 18 Ct. Cls. 569, and other cases. The Otis case was concerned with contracts for transportation of mails cross-town in New York city by wagons. The court said, (p. 327):

> "The Government can claim no other or more favorable rule than a private individual, and, as it is well known that instruments of this character are prepared by the Post-office Department, leaving to the contractor no choice as to form or phraseology, that construction must be adopted which is more to the advantage of the claimant."

Other cases in which the same rule was declared are cited at page 11, *supra.*

The Feasibility of the Project Was Warranted by the Government.

No doubt it will be clear now that what these appellants undertook to do was the construction of certain masonry, etc., in a protected enclosure prepared by the Government and upon existing masonry as foundations; and from this, of course, it would follow that the contract could not have been performed if either of two things had happened which the parties had no thought of or which, if thought of, were assumed to be impossible, viz: (1) the embankment had given way before the flood, or (2) the foundation masonry

had failed. "Completion of the lock" was the purpose of the contract; but there could be no "completion" of that particular structure if the existing portions were destroyed. A new structure could be erected, but the one previously commenced could not have been completed.

Peculiarly apposite here is the decision of this court in *Gibbons* v. *United States,* 190 U. S., 200. There a burned building was to be restored and the contract said: "The foundations and the brick walls now standing that were uninjured by the fire will remain and be carried up to the height designated on the plan by new work." After the work had begun the Government officer directed that one-third of the remaining portion of the wall, shown on the plan, should be removed and new work substituted. This court, affirming the judgment of the Court of Claims, held that the additional reconstruction was a new undertaking and the contractor was entitled to be paid therefor. In that case, and in this, the contractor was to be paid by units of work done; and the opinion of the Court of Claims (Chief Justice Nott) said in reference to the contractor's signing the understanding without any express assurance regarding the quality or solidity of the existing wall:

> "To a contractor it mattered not until he entered into a contract whether much or little should be utilized. If the former there would be so much the less for him to do, if the latter he would be paid for doing so much the more."

In the opinion of this court, rendered by Mr. Justice Matthews, it is pointed out that the Government received the benefit of the assumed sufficiency of the lower walls by escaping the higher price which otherwise any contractor would have charged in order to indemnify himself against the risk. Both of these features occur in the present case: (1) It was no concern of the Days whether they should do new work or restore old, washed-out work at the same prices, and (2) the Government, in the contract prices, had obtained the benefit of the assumed sufficiency of the protecting bulkhead.

This court's conclusion in the Gibbons case is as follows, (p. 204):

> "We lay no stress, as the Court of Claims did not, on what was said at the time * * * by unauthorized subordinates. The foundations and walls themselves, as left standing by authority of the proper officers, constituted under the circumstances a representation on the part of the United States that they had been adjudged to be so far uninjured that they were to remain, upon the faith of which the intending contractor was entitled to rely for the purpose of estimating the probable cost of the work to be done."

Did not the protecting embankment in the case now before the court constitute precisely this sort of representation? Should not the contractors have relied on it?

This wall was not "left" but was studiously constructed and reconstructed, for the purpose of this contract, by the Government. It, therefore, was an inseparable element in the contract; and its sufficiency was as much warranted by the Government as were the walls upon which Gibbons was to build.

The recent case of *Christie* v. *United States*, 237 U. S. 234, originated in a contract to excavate the site of locks and dams. There were indications from borings taken that logs, which would make the excavation more expensive, were buried in the earth, but the engineer said he did not consider them of enough importance to be mentioned or considered. The court said:

> "There was a deceptive representation of the material and it misled * * *.
>
> It makes no difference to the legal aspects of the case that the omission from the records of the results of the borings did not have any sinister purpose. There were representations made which were relied upon by claimants and properly relied upon, as they were positive." (pp. 241-242).

In the published reports describing the project upon which these appellants made their bid and took the contract it was distinctly set forth—just as distinctly as could have been expressed in any specifications or contract—that the site was protected by bulkheads deliberately and scientifically built up to a height which no flood waters could

reach. The contract, for its authority, referred to the appropriation, and the appropriation provided for the completion of "the present project"—the identical project described in these reports. (Reports 1891, Pt. 5, p. 3343; 1893, Pt. 4, p. 3507). It is respectfully submitted that when the representations so made to these appellants proved untrue and it was necessary to build the bulkheads to greater height and fortify them, the loss must fall upon the Government, not upon appellants.

BENJAMIN CARTER,
Attorney for Appellants.

FRANK CARTER POPE,
Of Counsel.

IN THE

Supreme Court of the United States.

JOHN GEORGE DAY and ISAIAH NEWTON DAY,
Partners under the firm name of
J. G. & I. N. DAY, *Appellants.*

vs.

THE UNITED STATES.

No. 43

REPLY BRIEF FOR APPELLANTS.

BENJAMIN CARTER,
Attorney for Appellants.

F. CARTER POPE,
Of Counsel.

PRESS OF THE BUDWARTH COMPANY, WASHINGTON

IN THE

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No. 43

REPLY BRIEF FOR APPELLANTS.

One little mistake at the first page of opposing counsel's "statement" calls first for correction. The appropriation of $326,250.00 was not "for" completion of the canal and locks in question. "Toward completion" would have been an apter expression. This particular appropriation —the performance of work sufficient to earn the sum named—was the immediate subject of the contract taken by appellants, though in the details of prices, &c., the con-

tract applied to all work to be done by appellants in completion of the improvement. The text of the appropriation is:

> "Improving canal at the Cascades of the Columbia River, Oregon; continuing improvement, three hundred twenty-six thousand, two hundred fifty dollars. * * *." (27 Stat. L. Ch. 158, p. 109).

Again, it would have been slightly more accurate to say, at page 2 of the brief, that the bulkhead referred to, built to the height of 142 feet above the datum line, had been designed studiously by the army engineers as affording an ample margin above any conceivable high water, rather than that the army engineers, at the time of letting this contract, "considered" that this was an ample margin.

Counsel for the Government rests his argument on the bare terms of the contract as imposing upon the contractor the risk of the bulkhead's sufficiency to accomplish the purpose for which the Government had built it. He says, (page 5) "a more sweeping and comprehensive statement of liability on the part of appellants" than that adopted in the contract could not have been framed. Whether this be true is immaterial, since the risk referred to is such as "it can not be believed that the contractee would have demanded or the contractor would have assumed" it if had been "dealt with." We quote here from *The Kronprincessin Cecilie* decided by the court since our original brief was written (244 U. S. Advance print, p. 22).

The present case, we submit, illustrates the principle of that decision as clearly as do the cases cited by Mr. Justice Holmes in the opinion where, e. g., a laborer was held to be excused by the prevalence of cholera (not mentioned in his contract) at the place where he had undertaken to work.

The objective of the Government engineers in covering this entire project by a single contract was economy—to get the least possible prices on the several classes of work to be performed. Naturally they would have repelled, as defeating that purpose, a suggestion of putting on the contractor the risk of the bulkhead's sufficiency and paying him the higher prices which then would have been demanded. So too these appellants, and the other bidders on the work, would have declined to assume that risk at prices, per units of work, less than those which had been paid theretofore, when the Government itself carried this risk, and which had been computed as necessary to be paid thereafter.

The facts are that the Government's officers had estimated this project by the mere expenditures which the Government had made in former years when the work was done at intervals, by day labor, and the prices submitted by appellants and most of the other bidders for continuance of the work were, as a rule, *less* than those which were thus calculated. (Reports of Chief of Engineers: 1891 Pt. 2, p. 3360; 1893; Pt. 4, p. 3509. Original brief for claimant, pp. 18, 19).

If the intent and effect of the contract had been to put on the contractors at such prices the chance, and the consequences, of the flooding of the work, that would have been a splendid economy for the Government; and the District Engineer hardly would have forborne mention of it when he made report to his chief, in a self-congratulatory vein, upon the contract that had been drafted and signed. (Report for 1894. Pt. 4, p. 2646).

The proceedings in Congress of which appellants' contract was the result are equally clear to the point that retrenchment in unit prices for construction and saving of time —these and nothing more—were the purposes sought in

providing for wholesale, instead of piecemeal contracting.

The revised and elaborated plan for completion of this improvement was communicated to Congress and printed in Senate Executive Document No. 72, 51st Congress, 2nd Session, to which our original brief, at page four, refers. The method of providing for this work was chosen in the next Congress by the House Committee on Rivers and Harbors and was communicated to the House in a report accompanying its appropriation bill (House Report No. 967, 52nd Congress, 1st session). This report explained that the continuous-contract system had been applied already to five improvements named in the document, and this was said of the new method: "It attains the desired end in the shortest time and at the minimum of expense." Details were furnished of savings in the work done in these five cases, as compared with previous expenditures, or with estimates, which ran from ten to thirty-three per cent.

Similar explanations occur in later committee reports and in debates; and nowhere is a hint to be found that in this new system the contractors had carried, or in the future operations were to carry, the risk of flood waters. If any such thing had been intended by the law-makers or by the parties to the contract here under review, "a purpose so important, so vital, would necessarily have found direct and positive expression"; it "would not have been left to be evolved by a forced and latitudinarian construction" of the specifications and contract—to adopt phrases employed by the present Chief Justice of this court in *Simpson vs. The United States,* 172 U. S., 372.

A sufficient extract from the House report to which we refer is printed as an appendix hereto.

Positive evidence of the understanding between the parties that appellants did not assume the burden of safeguarding

x Cong. Rec. Vol. 23, pp. 3937, 3938, 3971, 3976, 3977, 3980, 3981, 3985-3990, 4030, 4055, 4067, 4068, 4100, 4418, 4419, 4423-4458-4464, 5802

the work against flooding, and therefore of repairing damage done by flooding, are these facts:

(1) Not merely the local engineer in charge, but also Major Post, the District Engineer, examined and approved appellants' plans and methods in doing the emergency work which in the main saved the uncompleted structures from submergence by a record-breaking flood.

(2) Soon afterward Major Post had a talk with one of appellants about their compensation for this emergency work and a few months later he, by letter, promised them in effect, that "upon the completion of the contract" he would join them in computing how much was due them. (Rec. p. 17).

(3) In making his report upon this work Major Post felicitated the Department on the facts that labor in abundance had been at hand, by reason of the recent suspension of appellants' contract work for the season, and that the flood had actually done little damage. (Report for 1895, Pt. 5, p. 3572. Original brief pp. 30, 31).

(4) In other reports, where he seconded recommendations for raising the bulkhead some feet higher and for repair of this flood damage, Major Post pointed out that such shutting-off of the water was not contemplated either in appellants' contract or in the authorization thereafter, while repair of the damage actually suffered, though within the authorization, was not within the contract. (Report for 1895, Pt. 2, pp. 3572, 3574, 3577, 3581, 3582).

(5) Congress, following these recommendations, made appropriation for repair of damages and for building up the bulkhead, as well as for the construction called for by a change in plans for the permanent work. (Report for 1896, Vol. 2, p. 3268. Stat. L; Vol. 29, Ch. 314, p. 2333; Vol. 30, Ch. 425, p. 1148; Vol. 31, Ch. 1079, p. 1902. Original brief pp. 32, 33).

(6) By independent contracts these appellants or others (sometimes day labor) were employed to repair the damages, to build up the bulkhead and to carry on the construction of the permanent work, (Reports; 1897, Pt. 2, p. 3418; 1898, Pt. 4, p. 2981; 1899, Pt. 3, p. 3223; 1900, Pt. 6, p. 4324. Original brief pp. 6 and 12).

These were *res gestae* of the contract; and they are the surest of all guides by which to interpret the instrument.

When Government counsel says (p. 6) that if appellants had omitted the efforts by which they prevented an over flow "they would have suffered a far greater loss than the cost of this work," he, of course, begs the question of liability for the bulkhead. The argument, however, suggests anew the appositeness to the case at bar of the Gibbons case, cited on our former brief. In one event, as Chief Justice Nott of the Court of Claims said in his opinion (15 Ct. Cl. 190), there would have been more work for Gibbons to do than in another, and then he would have been paid just so much more. Just so, it was of no concern to the Days whether work of theirs, at their unit prices, would be new construction or restoration of work that had been washed away if they were to be paid for both by the units of work done.

This case is on all fours with Gibbons's also on the point. to which Mr. Justice Matthews, for this court, averted (109 U. S., 203), that the Government received the benefit of the assumed sufficiency of the existing works by escaping the higher prices which otherwise any contractor would have charged in order to indemnify himself against the risk.

These appellants ask nothing more than that their rights be declared to be just as they were always understood to be by the Government's agents with whom they were in contact and by Congress.

Inadvertently it has been said at the first page of our original brief that in these emergency operations appellants superimposed "three feet" of construction on the bulkhead. In fact, they built the bulkhead six feet higher beside broadening and reinforcing it. (Findings of fact, par. VI, Rec. p. 17. Opinion of Court of Claims, middle of Rec. p. 19).

BENJAMIN CARTER,
Attorney for Appellants.

F. CARTER POPE,
Of Counsel.

APPENDIX.

The aims of Congress in the continuous contract system as disclosed by the House Committee on Rivers and Harbors in reporting appropriation bill for fiscal year 1893—House Report No. 967, 52nd Congress, 1st Session, pages 2 and 3:

"The most important feature of the bill now presented is the extent it goes in authorizing the Secretary of War to make contracts for the completion of some of the more important works of river and harbor improvement.

"The river and harbor act of September 19, 1890, first inaugurated this policy by authorizing the Secretary of War to make contracts for the completion of the projects of improvement at the harbors of Philadelphia, Baltimore, and Galveston, and for the work in Hay Lake Channel and the lock and dam at the Sault Ste. Marie, appropriations to meet the payments under the contracts to be made from time to time by law.

"The departure from the old driblet system of appropriations was found to work so well that your committee determined to apply it on a larger scale than in the last act. Accordingly, the present bill authorizes contracts to be made by the Secretary of War for the completion of the following works of river and harbor improvement: Point Judith Harbor of Refuge, Rhode Island; the harbors of Charleston, South Carolina; Savannah, Georgia; Mobile, Alabama, and Humboldt, California; the work at the Cascades of the Columbia River, Oregon; that in the Hudson River up to Troy, N. Y., and the ship channel 20 and 21 feet deep through the shallows of the connecting waters of the Great Lakes between the cities of Duluth, Chicago, and Buffalo. In addition the bill authorizes the Secretary of War and the Mississippi River Commission to make contracts for work needed on the Mississippi River between St. Paul, Minn., and its mouth, running through three fiscal years, exclusive of the one for which the bill itself

carries an appropriation, not to exceed four millions a year for the whole river.

"In this way continuous work may be had on the projects put under the contract system until the same are completed, or as in the case of the Mississippi River, the limit fixed is reached. This is believed to be the true policy of river and harbor improvement. It attains the desired end in the shortest time and at the minimum of expense, and had this policy been adopted a dozen years ago your committee believe it would have resulted in a saving to the Government in the matter of river and harbor improvement of $20,000,000, out of the aggregate appropriated in that time for such work.

"As showing the great advantage of the continuous contract system your committee append hereto a letter from the Chief of Engineers, accompanied by a statement showing the saving to the Government by the application of this system to the five projects authorized in the last bill.

* * * * * * *

"St. Marys Lock and Canal.—Only the contracts for the excavation of the lock and contracts for the masonry of the lock have been made, but in these contracts alone there has been a saving of some 15 per cent of the estimated cost. Amount of saving, $768.000.

"At the Hay Lake Channel the work, estimated to cost $2,659,115, will be completed upon the execution of the existing contracts, and fully $900,000 within the estimate —a saving of one-third or 33 per cent.

"At Galveston it is believed the continuous contract for the construction of the jetties has resulted in a saving of some 10 per cent. of the original estimates, saving by this method $700,000.

"Baltimore Harbor.—The price in the continuing contract is 15½% less than the average prices paid in the last ten years under the system of annual contracts, saving by this method $94,500.

"Philadelphia Harbor.—The price under the continuing contract is only 33 per cent of the average price which during the past ten years has been paid on the Deleware for similar dredging under annual contracts."

In the Supreme Court of the United States.

JOHN GEORGE DAY AND ISAIAH NEWTON Day, partners under the firm name of J. G. & I. N. Day, appellants,
v.
THE UNITED STATES.

No. ~~284~~ 43

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT.

This is an appeal from a judgment dismissing the petition. Appellants entered into a contract with the United States on December 27, 1892, for the completion of a canal and locks at the Cascades of the Columbia River, Oreg., which the Government had been engaged in constructing for a period of sixteen years prior thereto. For its completion Congress had appropriated $326,250 in July, 1892. Immediately upon the execution of the contract appellants took control of the Government plant at the point of improvement and by May 28, 1894, had received from the Government $300,000.

Before submitting bids appellants visited the work, examined the weather records, stream gauges,

and the reports of the Chief of Engineers and of the local engineers, etc., in charge. Several days were consumed in a thorough examination of the project. Appellants were conducted by Lieut. Harry Taylor, the local engineer in charge, who gave them the benefit of all information in his possession concerning the conditions. Among other things, the Government had designed and constructed a bulkhead to an elevation of 142 feet for the protection of the works, which the Army engineers considered ample margin above the highest previous flood of 139.1 feet. (Finding III, Rec. 15.)

On May 28, 1894, it became evident that the work would be submerged and great damage done owing to flood conditions, and, under authority of the United States engineer officer in charge, appellants furnished the materials and constructed a new and higher bulkhead for a distance of 2,000 feet and two temporary dams, thereby saving the existing structures from injury. Appellants and their employees consumed about 10 days, during about one-half of which time work was prosecuted by night as well as by day.

In his report of June 30, 1894, the engineer in charge recommended that the protecting work be raised to 148 feet. This was approved by the Chief of Engineers, and the embankment brought to that height.

Appellants claim damages in the total sum of $41,711.88, which includes cost of work, services

of themselves and their representatives, and 10 per cent profit. (Finding VI, Rec. 16.)

Appellants' position is that this work was not contemplated by the contract, and therefore the expense incurred in preventing possible damage should fall on the Government.

The Government maintains that the contract is free from ambiguity, includes all expense incurred during the progress of the work for the preservation thereof, and that such expense should be borne by appellants.

The following paragraphs of the contract are pertinent to the issues (Rec. 18, 19):

> 2. The party of the second part shall furnish such labor and material in place, and do such work, and discharge such other obligations connected therewith prescribed in the forementioned specifications, as may be necessary to complete the work of "Improving canal at the cascades of the Columbia River, Oregon."
>
> 45. The contract to be entered into will include all excavations and dredging, including the removal of the bulkheads, masonry, filling behind walls, grading and protection of slopes, the placing of irons, the construction of the gates and operating machinery, in short, the entire completion of the lock ready for use, as shown by the drawings and set forth in these specifications.
>
> 149. Responsibility for property.—The contractor will be held responsible, without expense to the Government, for the preserva-

tion and good condition of all the work now in place, and such as he may from time to time under this contract put in place, until the termination of the contract, or until the whole work is turned over to the Government in a completed condition, as required. This to include all material of every description on which full or partial payments have been made and all property belonging to the United States in the possession or control of the contractor.

152. The contractor's prices for the various items shall cover all costs of preparation for work, all costs of the materials and appliances in place, all transportation, preservation until termination of contract, and every expense of whatever nature which the United States would otherwise have to pay that may arise during the progress of the work or continuance of this contract, except contingencies for engineering and superintendence by the agents of the United States.

ARGUMENT.

There is but one question in this case: Does the cost of the protective work come within the terms of the contract holding appellants responsible for the preservation of the project?

Appellants made a most thorough and searching investigation of the situation prior to submitting their bid. From a study of the weather conditions and the water gauges they were led to expect great floods in the springtime. They were possessed of all

the knowledge that the Government had of the situation and do not assert that any information was withheld or that they were misinformed.

The language of the specifications was free from ambiguity. Appellants executed a contract which required them (par. 45) to see to the "entire completion of the lock ready for use, as shown by the drawings and set forth in these specifications." They agreed (par. 149) to "be held responsible, without expense to the Government, for the preservation and good condition of all the work now in place, and such as he may from time to time under this contract put in place, until the termination of the contract, or until the whole work is turned over to the Government in a completed condition, as required." They were notified (par. 152) that the contractor's prices for the various items covered all costs of preparation for work, all costs of the materials and appliances in place, all transportation, preservation until termination of the contract, and further, that every expense arising during the progress of the work, except contingencies for engineering and superintendence, was to come from them.

It is impossible to formulate a more sweeping and comprehensive statement of liability on the part of appellants. The language is so explicit as to repel without argument the claim of ambiguity. Appellants were in possession of the project; the Government had relinquished its own possession and for this reason purposely bound them by the terms of this contract to protect the works. They were

required to complete the project. Had they not raised the bulkheads and built the temporary dams untold damage undoubtedly would have resulted and they would have suffered a far greater loss than the cost of this work. Thus it is apparent that this work was necessary.

Appellants do not and can not support a claim that the Government guaranteed that the water would not rise above 142 feet. The work they were called upon to do owing to the flood conditions was not impossible, for performance negatives this idea. The fact that it was expensive does not relieve them, nor place the responsibility upon the Government. Having failed to provide for such a contingency, under the terms of the contract they were bound.

Carnegie Steel Co. v. *United States*, 240 U. S. 156.

Maryland Dredging and Contracting Co. v. *United States*, 241 U. S. 184.

Dermott v. *Jones*, 2 Wall. 107.

Chicago, Milwaukee & St. Paul Ry. Co. v. *Hoyt*, 149 U. S. 1, 14.

Jacksonville, etc., Ry. Co. v. *Hooper*, 160 U. S. 514, 527.

United States v. *Gleason*, 175 U. S. 588, 602.

Chicago Ry. Co. v. *Sawyer*, 69 Ill. 285.

Moreover, the terms of the contract provided (par. 162, Rec. 12) that "No claim for extra work or material, or for delay of any kind will be considered or paid unless an agreement therefor shall be made in writing and approved by the Chief of Engineers,

United States Army." Not only did appellants fail in this requirement, but they made no protest against doing the work. Their failure to do this should not only foreclose their claim, but substantiate the idea that the allegation of ambiguity was an afterthought.

For the foregoing reasons it is respectfully submitted that the decision of the lower court should be affirmed.

HUSTON THOMPSON,
Assistant Attorney General.

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